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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD ROWE, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES D. RHODES
Hartig, Rhodes,
Norman & Mahoney
717 K Street
Anchorage, AK 99501
(907) 274-3576

February 23, 1981

Ken Wray's Print Shop, Inc., 323 East Fireweed, Anchorage, Alaska 99503, 907-276-4535

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QUESTION PRESENTED

Can the United States Government, under federal common law, accept as earned, and then spend and refuse to return, advance rentals tendered for oil and gas leases on public lands, yet have no obligation to issue those leases?

INTERESTED PARTIES

RICHARD ROWE, JACK FRICKE, WALTER SCZUDLO, DENNY BREAID, CHARLES LAFFERTY, ELKAN MORRIS, DAN GUADIANNE, EDWIN SAMAY, NEW STATE FINANCE, INC., FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Robert Briggs, deceased, DAN RAMRUS, ROBERT J. COLLINS, LEN HANNAMAN, WALTER WIGGER, WINNIFRED WIGGER, PAUL GREIMANN, JR., E. B. JOINER, G. M. ANDERSON, J. B. APPLING, SARADELL ARD, BURTON ARRESTAD, JOSEPH BABINEC, QUINTON CHRISTENSEN, JUANA EDWARDS, G. H. DRUMHELLER, GAYLE FOGELSON, KENNETH GAIN, OTTO GREEN, MATHEW HAMANN, ERNEST HOLM, R. C. KILTZ, FRANCES MACHADO, KENNETH RANKIN, H. G. SCHIFF, W. A. TWEEDY, JAMES VANDERWEELE, RICHARD WARREN, et al., MERRILL WIEN, DOUGLAS MILLARD, W. ZAEGEL, TOM THOMAS, E. G. SCHOOT, W. M. SHEAR, F. ZAWAKI, PAUL GREIMANN, SR., and FLORA GREIMANN.

INDEX

	Page
Question presented	i
Interested parties	i
Citations	iii
Opinions below	2
Jurisdiction	2
Statutory provisions involved	2
Statement of the case	3
A. The Secretary's Solicitation and Acceptance of Offers to Lease.	4
B. The Proceedings Below.	7
Reasons for issuing the writ	8
Conclusion	15

CITATIONS

Cases:	Page
Acadia, California, Ltd. v. Herbert, 54 Cal.2d 328, 353 P.2d 294, 5 Cal. Rptr. 686 (1960)	10, 11
Burglin v. Morton, 527 F.2d 486 (9th Cir. 1975)	9
Cold Metal Process Co. v. Commissioner, 247 F.2d 864, 872 (6th Cir. 1957)	11
Duesing v. Udall, 350 F.2d 750 (D.C. Cir. 1965)	9
In re Arctic Slope/Western, ANCAB #RLS76-11(A)-(M)	7
In re Arctic Slope/Eastern (Central), ANCAB #RLS76-12(A)-(O)	7
McTiernan v. Franklin, 508 F.2d 885 (10th Cir. 1975)	9
Mitchell v. Simms, 63 S.W.2d 371 (Texas Civ. App. 1933)	10
Redding Steel Casting Co. v. United States, 268 U.S. 186, 188 (1925)	9

Richard Rowe v. United States of America, 464 F.Supp. 1060 (D. Alaska 1979) 2, 8

Richard Rowe v. United States, 633 F.2d 799 (9th Cir. 1980) 2, 8

Russell v. Texas Co., 238 F.2d 636 (9th Cir. 1956) 10

Superior Oil Co. v. Udall, 409 F.2d 1115, 1121-1122 (D.C. Cir. 1969) 9, 10, 12, 13, 14

Thomson v. United States, 357 F.2d 683, 389 (Ct. Cl. 1966) 10

Udall v. Tallman, 380 U.S. 1, 4 (1965) 9

United States v. Purcell Envelope Co., 249 U.S. 313, 318 (1919) 9

Warrior Constructors, Inc. v. Small Bus. Inv. Co., 536 S.W.2d 382 (Tex. Civ. App. 1976) 11

Statutes:

Alaska Native Claims Settlement Act, 83 Stat. 688, 43 U.S.C. §§ 1601 et seq.	3, 7
Mineral Leasing Act, §§ 17(a) and (c), 41 Stat. 437, 30 U.S.C. § 181 et seq.	2, 4
Uniform Commercial Code, § 2-606(1)(c)	11
5 U.S.C. § 554	7
5 U.S.C. §§ 701-706	7
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331(a)	7
28 U.S.C. § 1361	7
28 U.S.C. § 2201	7
28 U.S.C. § 2202	7
28 U.S.C. § 2409(a)	7
30 U.S.C. §§ 226(a) and (c)	2

Miscellaneous:

Restatement, Second, Contracts § 72(2) (Tent. Draft Nos. 1-7, 1973)	11

1 Williston, Contracts
§§ 90, 91D (rev. ed. 1970) 11

31 Fed. Reg. 12575 4

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Richard Rowe, et al., petitioners herein, pray that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 28, 1980.

OPINIONS BELOW

The November 28, 1980 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at Richard Rowe v. United States, 633 F.2d 799 (9th Cir. 1980), and is reprinted in Appendix A hereto, pp. 1-11. The opinion of the United States District Court for the District of Alaska is reported at Richard Rowe v. United States of America, 464 F.Supp. 1060 (D.Alaska 1979) and is reprinted in Appendix A hereto, pp. 12-76.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Mineral Leasing Act, §§ 17(a) and (c), 30 U.S.C. §§ 226(a) and (c):

> (a) All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.
>
> ....
>
> (c) If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding.

> Such leases shall be conditioned upon the payment by the lessee of a royalty of 12-1/2 per centum in amount or value of the production removed or sold from the lease.

STATEMENT OF THE CASE

This is a contract action under federal common law brought by numerous individuals seeking to compel the Secretary of the Interior (Secretary) to issue oil and gas leases to them. The lands involved were conveyed from the United States to the Arctic Slope Regional Corporation (ASRC) under the Alaska Native Claims Settlement Act (ANCSA), 83 Stat. 688, 43 U.S.C. § 1601 et seq.

A. The Secretary's Solicitation and Acceptance of Offers to Lease.

The Mineral Leasing Act, 41 Stat. 437, 30 U.S.C. § 181 et seq., authorizes the Secretary to lease without competitive bidding public lands not containing known deposits of oil and gas. On September 23, 1966, the Secretary published a notice soliciting oil and gas lease offers covering the lands involved in this case. 31 Fed. Reg. 12575, App. pp. 99-105. The solicitation stated:

> [T]he lands described therein will become available for noncompetitive oil and gas leasing pursuant to the Mineral Leasing Act of February 25, 1920 . . . The provisions of this notice shall supersede any provisions of the regulations with which they may be in conflict.
>
> ....

> Offers to lease must be submitted on a "Special Oil and Gas Drawing Entry Card", Form 4-1720, signed by the applicant . . . . Only one entry card will be drawn for each leasing block. The entry card must be accompanied by a $10 filing fee and the first year's advance rental for the total area as shown on the appropriate approved leasing map.
>
> ....
>
> Upon the determination of the successful drawee for a particular block, the first year's rental will be earned and deposited in the U.S. Treasury, and will not be returnable.

The Assistant Director of the Bureau of Land Management (BLM) explained the function of the Special Oil and Gas Drawing Entry Card:

> The card has been designed so that the offeror's signature thereon binds him to a lease on Form 4-1158. This system is designed so that the leases can be issued

> immediately upon determination of the successful drawees. This means that the advance rental for these leases can also be deposited immediately to the earned account.

Where more than one person offered to lease the same parcel of land, the Secretary was to reject all offers except the one drawn by lot. On December 20, 1966, seventy-nine offers submitted by Petitioners were drawn by lot. The Secretary at that time accepted as earned the first year rentals then due under the leases, totalling $100,120.00 in checks and money orders tendered by Petitioners, and deposited those earnings in the earned account of the United States Treasury. The Secretary subsequently refused to issue Petitioners their

leases, yet for ten years refused to return the rentals paid because they had been earned.

Prior to the December 20, 1966 drawing, Alaskan natives protested federal leasing of lands to which they asserted aboriginal claims. In response to these protests, the Secretary suspended issuance of leases on affected lands. Shortly before the December 20, 1966 drawing, the Secretary posted notices in the Anchorage and Fairbanks offices of the BLM, and in a Fairbanks newspaper, announcing that the drawing would be held but that issuance of the leases would be postponed pending further consideration of the aboriginal claims. The record does not establish whether any

persons who received this notice failed to withdraw their offer and tender of first year rental fees. Oil was discovered in 1968 at Prudhoe Bay, nearby the lease lands at issue and, in 1976, the BLM transferred these lands, subject to valid existing rights, to ASRC under the Alaska Native Claims Settlement Act, 83 Stat. 688, 43 U.S.C. § 1601 et seq., 1613(g).

B. The Proceedings Below.

Petitioners appealed to the Alaska Native Claims Appeal Board from the BLM's approval of the lease land conveyances to ASRC. In re Arctic Slope/Western, ANCAB #RLS76-11(A)-(M); In re Arctic Slope/Eastern (Central), ANCAB #RLS76-12(A)-(O); App., pp. 77-97. The Secretary assumed direct

original jurisdiction over the appeals, and, on November 24, 1976, upheld the BLM conveyance approval, holding that Petitioners had no contractual rights to the lease lands. Id. The Secretary then attempted to reimburse to Petitioners the $100,120.00 the United States had earned ten years earlier for the first year of tenancy. Petitioners refused the tender of reimbursement and demanded issuance of their leases.

Petitioners challenged the Secretary's actions in the United States District Court for the District of Alaska, invoking the court's jurisdiction under 5 U.S.C. § 554; 5 U.S.C. §§ 701-706; 28 U.S.C. § 1331(a); 28 U.S.C. § 1361; 28 U.S.C. § 2201; 28

U.S.C. § 2202; and 28 U.S.C. § 2409(a). Petitioners sought to compel the Secretary to issue the leases to them, rather than ASRC, and money damages. The District Court granted the United States and ASRC summary judgment under Federal Rule of Civil Procedure 56(b), affirming the Secretary's opinion that Petitioners had no contractual rights to the lease lands. Rowe v. United States, 464 F.Supp. 1060, (D. Alaska 1979); App., pp. 12-76. On appeal, the Ninth Circuit held that the District Court lacked jurisdiction over Petitioners' claims for money damages, but affirmed the District Court's decision on summary judgment that Petitioners failed to establish any contractual right to the leases.

Rowe v. United States, 633 F.2d 799 (9th Cir. 1980); App., pp. 12-76.

REASONS FOR ISSUING THE WRIT

Issuance of a writ of certiorari to review the decision of the Ninth Circuit is necessary to establish certainty and reliability in the sale of oil and gas leases on public lands.

The Secretary has broad power under the Mineral Leasing Act to issue oil and gas leases on public lands not within any known geological structure of a producing oil and gas field Udall v. Tallman, 380 U.S. 1, 4 (1965). The Act gives the Secretary discretion to refuse to issue any lease at all on such lands, requiring only that if such a lease is issued, it must be

issued to the first qualified applicant. Id. The Secretary has broad authority to determine how and when he will exercise his discretion to lease, including the authority to contract to issue oil and gas leases. See, e.g., Burglin v. Morton, 527 F.2d 486 (9th Cir. 1976); McTiernan v. Franklin, 508 F.2d 885 (10th Cir. 1975); Duesing v. Udall, 350 F.2d 750 (D.C. Cir. 1965). However, when the Secretary seeks to enter into a contract to issue an oil and gas lease, his rights and obligations are generally governed by the same rules of contract law that are applied to transactions between private parties. See Redding Steel Casting Co. v. United States, 268 U.S. 186, 188

(1925); United States v. Purcell Envelope Co., 249 U.S. 313, 318 (1919). There comes a point in the contracting process where the Secretary exhausts his discretion and becomes obligated to issue a lease. Superior Oil Co. v. Udall, 409 F.2d 1115, 1121-1122 (D.C. Cir. 1969) (Burger, Judge); see United States v. Purcell Envelope Co., supra, 249 U.S. at 318.

The notice by which the Secretary solicited offers to lease bound Petitioners to pay their first year's rent, $1,280.00 per lease tract, immediately upon determination of the successful offeror on December 20, 1966. Under the terms of the solicitation, the Secretary "earned" those rentals at that time. On December 22,

1966, the Secretary in fact accepted the $101,120.00 in checks tendered by Petitioners as first-year rentals. He later endorsed and cashed those checks, and deposited the proceeds in the earned account of the United States Treasury. Moreover, for the next ten years he refused to return to Petitioners these monies, asserting that he had earned them on December 20, 1966.

The Secretary accepted and treated as earned the $101,120.00 in rent checks tendered by Petitioners with their offers to lease, and he should not be allowed to deny that he accepted those offers. Superior Oil Co. v. Udall, supra, 409 F.2d at 1121-1122; Mitchell v. Simms, 63 S.W.2d 371 (Texas Civ.

App. 1933); see Thomson v. United States, 357 F.2d 683, 689 (Ct. Cl. 1966); Russell v. Texas Co., 238 F.2d 636 (9th Cir. 1956); Acadia, California, Ltd. v. Herbert, 54 Cal.2d 328, 353 P.2d 294, 5 Cal. Rptr. 686 (1960); Warrior Constructors, Inc. v. Small Bus. Inv. Co., 536 S.W.2d 382 (Tex. Civ. App. 1976); Restatement, Second, Contracts § 72(2) (Tent. Draft Nos. 1-7, 1973); 1 Williston, Contracts §§ 90, 91D (rev. ed. 1970); cf. Uniform Commercial Code, § 2-606 (1)(c). The Secretary "earned" the rentals he accepted from Petitioners only if he undertook to render that for which these rentals had been tendered, i.e., the leases. See Cold Metal Process Co. v. Commissioner, 247 F.2d 864, 872

(6th Cir. 1957). If Petitioners became bound on their offers to lease, so that they could not resist enforcement by the Secretary of their obligation to pay the first year's rent, they acquired the right to enforce the obligation of the Secretary to issue the leases. Thus, the point in the lease procurement process at which the Secretary became bound to issue the leases was the same as that at which Petitioners became bound to pay their first year's rent: at the time of the drawing on December 22, 1966.

The decision of the Ninth Circuit in the instant case squarely conflicts with the position of the Court of Appeals for the District of Columbia on the Secretary's acceptance of oil

and gas lease offers. Mr. Chief Justice Burger, while sitting on that Court of Appeals, held that a lesser exercise of dominion by the Secretary over rentals submitted with oil and gas lease offers than that present in the case at bar constituted acceptance of the offers to lease. Superior Oil Co. v. Udall, 409 F.2d 1115 (D.C. Cir. 1969). In Superior, the Secretary endorsed for the account of the United States and deposited for collection a check accompanying Superior Oil Company's offer to lease oil and gas tracts. The proceeds were placed in a "suspense account" pending resolution of irregularities in an offer submitted on the same tracts by Union Oil Company. Checks accompanying all other

offers were returned uncashed to the unsuccessful offerors. District Court Judge Sirica found that the Secretary accepted Superior's offer to lease by endorsing and cashing Superior's check, held the Secretary had a duty to issue the leases to Superior, and directed the Secretary to issue the leases to Superior. The Court of Appeals for the District of Columbia affirmed.

In the case at bar, the Secretary endorsed for the account of the United States and deposited for collection all checks accompanying Petitioners' offers to lease oil and gas tracts. The proceeds were placed not merely on deposit in a "suspense account" of the United States Treasury, as in Superior,

but rather in the earned account of the Treasury. Moreover, the United States spent the collected rental fees. All checks accompanying other offers were returned to unsuccessful offerors. Under the principles applied by Mr. Chief Justice Burger in Superior, the Secretary accepted Petitioners' offers to lease when he endorsed and deposited Petitioners' checks and placed the proceeds thereof into the earned account of the United States Treasury. Therefore, the conveyance of the lands involved to ASRC was subject to Petitioners' valid existing rights to these leases, and the Secretary should be directed to issue the leases to Petitioners.

In Superior, Mr. Chief Justice Burger articulated the special and important policy considerations presented by the case at bar:

> Having in mind the large sums involved, the large public interest in precision and secrecy of bids for the sale of public land leases, and in the careful procedures called for, the bidders and the public have a substantial interest in certainty. This underlies the detailed procedures provided in the regulations. The need for precision, care and certainty is underscored by the fact that the interest at current permissible rates on the funds of Union and Superior which are immobilized during the pendency of this litigation amount to more than $800 per day; thus bidders and the public have an acute economic interest in having bids resolved surely and swiftly.
>
> * * * *
>
> [T]here are other significant considerations which must be

> weighed and which have important implications beyond this particular transaction; they are factors which affect the integrity of the entire governmental program of selling oil leases on public lands and indirectly indeed the whole process of making public contracts by the process of sealed bids.

409 F.2d at 1119-1120.

The decision of the Ninth Circuit in the case at bar renders uncertain the process by which the Government issues oil and gas leases on public lands, calls the integrity of that process into question, and thereby undermines public confidence as well as that of persons dealing with the Government. This Court should take this opportunity to establish certainty and reliability in the sale of oil and gas leases on public lands.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

JAMES D. RHODES
HARTIG, RHODES,
NORMAN & MAHONEY
717 K Street, Suite 201
Anchorage, AK 99501

Attorneys for Petitioners

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INDEX

	Page
Richard Rowe, et al., v. United States of America et al., No. 79-4249 (9th Cir., opinion filed November 28, 1980)	1
Richard Rowe, et al., v. United States of America, et al., 464 F.Supp. 1060 (D. Alaska 1979)	12
In re Arctic Slope/Western, In re Arctic Slope/Western (Central), ANCAB # RLS 76-11 (A)-(M), ANCAB # RLS 76-12(A)-(O), BLM F-19148 (Secretary's decision filed November 24, 1976)	77
Richard Rowe, et al, v. United States of America, et al., No. A76-280 (U.S. Dist. Ct. Judgment filed January 11, 1979)	98
Notice of Filing of Protraction Diagrams for Northern Alaska and of Availability of Lands for Noncompetitive Oil and Gas Leasing	99

UNITED STATES COURT
OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4249

[Nov. 28, 1980]

RICHARD ROWE, et al.,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.

Appeal from the
United States
District Court
for the
District of Alaska

Before: WALLACE, HUG and SCHROEDER,
Circuit Judges

WALLACE, Circuit Judge:

Appellants protest the ruling of the district court that their trespass claims were extinguished by the Alaska Native Claims Settlement Act. We affirm.

OPINION

Several individuals (plaintiffs) appeal from the district court's entry of a summary judgment. The plaintiffs are persons who had won the opportunity to participate in a non-competitive bidding procedure for oil and gas leases on the Alaska North Slope. The defendants are the United States, the Secretary of the Interior (the Secretary), and the Arctic Slope Regional Corporation (ASRC). Despite having selected the plaintiffs as the recipients of the oil and gas leases, the Secretary ultimately awarded the lands that the plaintiffs sought to lease to the ASRC. The plaintiffs challenged the Secretary's award in an administrative proceeding, and, after an adverse ruling, sought federal judicial review.

In the district court, plaintiffs sought to compel the Secretary to award the oil and gas leases to them, rather than to the ASRC, and money damages. The district judge provided a completed recital of the facts. See Rowe v. United States, 464 F. Supp. 1060 (D. Alaska 1979).

The plaintiffs claim that by selecting their offers, the Secretary was bound contractually to issue the leases to them. The Secretary contends, on the other hand, that the selection of the plaintiffs' offers created no contractual commitment to issue leases.

Rather, the Secretary contends that he was bound only to give priority to the persons whose offers were selected if he decided to issue the leases to anyone. We affirm in part and reverse and remand in part.

I

We first address the question of jurisdiction. The ASRC is the only party to have addressed the jurisdiction issue, and it has done so only briefly. We may, however, raise jurisdictional questions even if the parties fail to do so. See Continental Ins. Co. v. Cotten, 427 F.2d 48, 51 (9th Cir. 1970); 1 Moore's Federal Practice ¶ 0.60[4], at 628-29 (2d ed. 1980).

The Tucker Act vests exclusive jurisdiction of contract claims against the United States in excess of $10,000 in the Court of Claims. 28 U.S.C. §§ 1346, 1491. Plaintiffs have raised a contract claim and have requested damages in excess of $10,000. The Court of Claims has exclusive jurisdiction over plaintiffs' claim for damages, and therefore, the district court was without jurisdiction to hear that part of the plaintiffs' claim.

Although plaintiffs have argued only their contracts claim on appeal, there is more to the case than a prayer for contract damages. If

plaintiffs could have established a contract right, they would, arguably, have established a "valid existing right" within the meaning of § 14(g) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(g). If plaintiffs had a "valid existing right," they would have had rights superior to those of the ASRC, and would, arguably, had had a right to the leases the sought. Thereffore, plaintiffs' contract argument on appeal was directed only only to a claim for damages, but to a review of the Secretary's decision not to award the leases. Thus, the remaining jurisdictional question before us is whether the district court had jurisdiction to review agency action under these circumstances.

The district courts have jurisdiction, without regard to amount in controversy, over actions against the United States, its agencies or its officers acting in their official capacities. 28 U.S.C. § 1331(a).[1] The administrative Procedures Act (APA) provides for judicial review of agency action and a waiver of sovereign immunity[2] in an action for relief other than money damages that states a claim that a federal agency or officer failed to act as required in an official capacity. 5 U.S.C. § 702;[3] Hill v. United States, 571 F.2d 1098, 1102 (9th Cir. 1978). If this were strictly a review of agency action, the district court would have

had jurisdiction. We hold that the district court would have had jurisdiction. We hold that the district court had jurisdiction over this case, as a review of agency action, except to the extent that the plaintiffs claim damages in excess of $10,000.

In Lee v. Blumenthal, 588 F.2d 1281 (9th Cir. 1979), we held that 5 U.S.C. § 702 "does not affect existing limitation on district court jurisdiction, such as the Tucker Act." Id. at 1283, citing Estate of Watson v. Blumenthal, 586 F.2d 925, 933 n.14 (2d Cir. 1978). In Lee, the plaintiffs sought to compel the Secretary of the Treasury to redeem flower bonds. We refused to characterize the case as either one involving contracts or a review of agency action for the purpose of determining whether the Tucker Act of § 1331 applied. In either event, the plaintiff's remedy was money damages in excess of $10,000. We observed that the Court of Claims had jurisdiction over claims "for money damages 'founded upon . . . any regulation of an executive department.'" Lee v. Blumenthal, supra, 588 F.2d at 1282. We concluded that the district court was without jurisdiction over the case because the case fell within the Tucker Act's grant of exclusive jurisdiction to the Court of Claims, which was an existing limitation on the jurisdiction of the district court. Id. at 1283.

The case before us is unlike Lee. This is not one claim that could be characterized as either a contract claim or an agency review. Rather, plaintiffs have sought two different remedies: money damages and to compel a federal officer to perform a duty other than paying money. We do not think that the joinder of the claim of money damages with a claim for review of agency action necessarily divests the district court of jurisdiction over both claims.

To hold that a district court has no jurisdiction over an agency review whenever the review is coupled with a claim for money damages in excess of $10,000 would run afoul of Califano v. Sanders, 430 U.S. 99 (1977). There the Court held that § 1331(a) conferred jurisdiction on federal courts to review agency action, "subject only to preclusion-of-review statutes created or retained by Congress." Id. at 105. See Stockelman v. United States, 563 F.2d 413, 415 n.2 (9th Cir. 1977). In Lee, we held that the Tucker Act limited district court jurisdiction over claims for money damages, even if they could also be characterized as agency reviews. The Tucker Act, by its terms, applies only to claims for money damages. Therefore, it does not preclude review of agency action when the relief sought is other than money damges. See Sheehan v. Army and Air Force Exchange Service, 619 F.2d 1132, 1140 (5th Cir. 1980.

Our conclusion is bolstered by the fact that the Court of Claims, which would have jurisdiction if the Tucker Act governed the entire case, has the power to award only money damages, not equitable relief, such as injunctions, declaratory judgments, or specific performance. Richardson v. Morris, 409 U.S. 464, 465 (1973) (per curiam); Quinault Allottee Assoc. v. United States, 453 F.2d 1272, 1274 & n.1 (Ct. Cl. 1972). Although the Court of Claims may employ equitable doctrines as a means to determine the amount of a money judgment (e.g. accounting) or as a substantive means by which to base the award of a money judgment (e.g. reformation), Pauley Petroleum, Inc. v. United States, 591 F.2d 1308 (1315 (Ct. Cl.), cert. denied, 444 U.S. 898 (1979), we find no authority, and no basis to infer, that the Court of Claims would have jurisdiction to compel the Secretary of the Interior to award the oil and gas leases to the plaintiffs, pursuant to their agency appeal. The Tucker Act does not provide for this type of specific equitable relief.

Our holding in this case will not undermine the exclusive jurisdiction of the Court of Claims by encouraging litigants to join spurious claims of agency review with claims for money damages against the government. First, we emphasize that such joinder does not give the district court jurisdiction over the claim for damages

in excess of $10,000. Second, we have said that the Court of Claims' jurisdiction cannot be avoided by a complaint that appears to seeks only equitable relief when "the real effort of the complaining party is to obtain money [in excess of $10,000] from the federal government." Bakersfield City School Dist. v. Boyer, 610 F.2d 621, 628 (9th Cir. 1979). By the same token, the Court of Claims' jurisdiction cannot be avoided by a complaint that purports to join an agency reivew with a claim for money damages when the agency review is spurious or when the actual relief resulting from the agency review would be monetary. See Lee v. Blumenthal, supra, at 1283. Our holding is not meant to encourage the bifurcation of such claims for relief.

We conclude, then, that the district court lacked jurisdiction to determine plaintiffs' claim for damages. As to that claim, we reverse and remand with directions that the district court dismiss for lack of jurisdiction or, in its discretion, to transfer to the Court of Claims pursuant to 28 U.S.C. § 1406(c). See Lee v. Blumenthal, supra, 588 F.2d at 1283. The district court did have jurisdiction over the review of the Secretary's action in refusing to issue the leases.

II

Turning to the merits, we agree with the district court that the plaintiffs failed to establish any right to the leases they sought, by contract, statute, or otherwise. We affirm the grant of summary judgment for the defendants on this issues for the reasons stated in the district court's opinion. Rowe v. United States, supra, 464 F. Supp. 1060. We observe that the district court had before it two sets of plaintiffs: the Rowe plaintiffs and the Rowlett plaintiffs. Only the Rowe plaintiffs have appealed, and their claims[4] are the only ones before us.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

FOOTNOTES

1/ 28 U.S.C. § 1331 provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer, or employee thereof in his official capacity.
>
> . . . .

2/ We assume, but do not need to decide, that the plaintiffs' claims against both the United States and the Secretary are actions against the sovereign and would not be maintainable without consent. See Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 688-90 (1949).

Footnotes (Cont).

3/ 5 U.S.C. § 702 provides in part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action withing the meaning of a relevant statute, is entitled to judicial review thereof. . . . The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States . . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

4/ Also not before us is whether our disposition on the merits collaterally estops the plaintiffs from refiling their claim for damages in the Court of Claims.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD ROWE, et al.,	)	
	)	
Plaintiffs-Appellants,	)	
	)	No. 79-4249
vs.	)	
	)	D.C. No.
UNITED STATES OF AMERICA, et al.,	)	A-76-280
	)	
	)	
Defendants-Appellees.	)	
	)	

MEMORANDUM OPINION AND ORDER

FITZGERALD, District Judge

These two cases, now before the court on cross-motions for summary judgment, manifest a continuing effort by plaintiffs to secure oil and gas leases on the North Slope of Alaska.1/ Plaintiffs are unsuccessful applicants for federal oil and gas leases filed under provisions of the Mineral Leasing Act of 1920.2/ The defendants are the United States, the Secretary of the Department of the Interior,3/ and the Arctic Slope Regional Corporation,4/ one of twelve Native corporations established by Act of Congress in the Alaska Native Claims Settlement Act of 1971.5/ In large part, plaintiffs seek judicial review of the Secretary's rulings6/ upholding certain land selections and subsequent conveyances made

to defendant Regional Corporation pursuant to the Settlement Act. These conveyances, plaintiffs claim, should be made subject to oil and gas leases to which plaintiffs are entitled.7/ A review of the history of Alaska Native land claims, and their relationship to the mining laws applicable to Alaska, serves to put the issues in perspective.

I. HISTORY OF THE CASE

Alaska Native land claims extend back in time to the Treaty of Cession of March 30, 1867; however, they were not directly addressed by Congress until passage of the Settlement Act in 1971. Although an earlier opinion of this Court traces this history in considerable detail,8/ it bears repeating that when the Mineral Leasing Act was passed in 1920, no provision was included respecting Alaska Native use or occupancy. The first significant statute providing for conveyance of lands to Natives in Alaska, then under territorial status, merely provided procedures whereby Natives might acquire patents to lots within Native townsites.9/

For a number of reasons, no treaties were ever executed between the United States and Alaska Native groups either designating reservation lands for Native occupation, or defining Native fish and game rights; and although seven reservations were created by the Secretary, and other lands

withdrawn by various Executive Orders for the benefit of certain Native groups, these actions did not affect the Native groups inhabiting the North Slope.10/

The situation of the North Slope Natives remained largely unchanged until passage of the Alaska Statehood Act in 1958.11/ Congress provided in the Statehood Act that Alaska in making its selection of 102,500,000 acres, "disclaim all right and title . . . to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts . . . or is held by the United States in trust for said [N]atives." The Act went on to declare that such "lands or other property" would remain within the absolute jurisdiction and control of the United States "until disposed of under its authority, except to such extent as the Congress had prescribed or may hereafter prescribe . . .."12/ As a result, Native rights were untouched by the Statehood Act.

It was the intent of Congress in the Statehood Act to provide the new state with a solid economic foundation.13/ It is therefore not surprising that in addition to the grant of 102,500,000 acres of land, the State of Alaska was granted 90 percent of the revenues received by the United States from coal and mineral leases situated

on Alaskan lands retained by the federal government.14/

Given this policy of the federal government regarding the disposition of Alaskan lands, it is also not surprising that in the same year as passage of the Statehood Act, the Secretary issued Public Land Order 1621 15/ opening large sections of federally-owned North Slope lands to mineral exploration by private individuals through issuance of oil and gas leases under the Mineral Leasing Act.16/

The 1958 lease opening of PLO 1621 amounted to a general release of the lands described. Before designated tracts might be opened to leasing, it was necessary to prepare, approve and file leasing maps and to publish a notice of availability in the Federal Register.17/

By early 1964 only two areas had had the proper protraction maps drawn up and filed. Leases were issued for those lands.18/ At that time protraction maps existed for the balance of the opened lands, but the Secretary had not yet caused them to be filed. However, the Department did have detailed plans underway to lease approximately 16-18 million acres located between the two areas already leased. This was to be accomplished in four separate openings.19/ It is the fourth and last of these openings that is the

subject of controversy in these two cases.

An analysis of the essential features of the Mineral Leasing Act as it existed in 1966 is appropriate at this time. Section 226 of the Act grants discretionary authority to the Secretary to issue oil and gas leases on federal lands. Subsection (c), the provision applicable to these cases, concerns the leasing of lands "not within any known geological structure of a producing oil or gas field" and provides that such leasing may occur without competitive bidding, on a priority-in-time basis.20/

Two procedures were devised for the non-competitive leasing of § 226(c) federal lands. Under the first, or "simultaneous filing" method, lease applicants filed offers pursuant to a notice from the Secretary that lands were available for leasing. This was the procedure followed by the plaintiffs in Rowe. On a designated date, the Secretary would hold a drawing to determine the "successful drawee," as between several lease applicants for a particular block of acreage. Once so determined, the successful drawee became the first qualified applicant or offeror for a particular lease.21/

The second or noncompetitive leasing method (involving the Rowlett plaintiffs) simply involved the filing of "over-the-counter" lease offers in

the designated office of the Bureau of Land Management; the first qualified applicant to file an offer would acquire priority for a lease as against other lease applicants. The Department employed this second method to facilitate the leasing of two types of land: land for which no lease applications had been received under the "simultaneous filing" method but which remained opened and available, and land for which current lease terms had expired under the mandatory ten-year limitation.

Public Land Order 1621, together with Public Land Order 3521, required that a simultaneous filing period be provided for in the four separate openings previously mentioned. Additionally, the Secretary had promulgated extensive regulations governing the two noncompetitive lease filing procedures.22/

In September, 1966, the Secretary published the fourth and last notice relating to PLO 3521 lands.23/ The September notice provided that those offers to lease filed between September 26, 1966, and November 18, 1966, would be considered as having been simultaneously filed.24/ Thereafter over-the-counter offers to lease would be considered for blocks of lands which did not have outstanding simultaneous offers on the date of the drawing.

The Rowe plaintiffs responded to the September notice by filing offers

within the simultaneous filing period. The Rowlett plaintiffs thereafter filed over-the-counter offers for a number of the remaining blocks. The Rowlett plaintiffs apparently also filed over-the-counter offers for lands opened by the three earlier notices,25/ although all the Rowlett offers were filed between 1966 and 1969.26/

Long before the September, 1966 leasing program, Native groups and individuals had voiced protests against State and Federal disposition of lands alleged by the Natives to be subject to claims of aboriginal ownership. Beginning in late 1961 the Bureau of Indian Affairs filed protests on behalf of various Native groups,27/ including protests conflicting with 1,750,000 acres of the State's initial selections. As State selections continued through the 1960's, the filing of individual or village protests mounted steadily. By April, 1968, forty protests, covering some 300,000,000 acres, or 80% of the State, had been filed, with the North Slope Native Association laying claim to virtually the entire North Slope.28/

The position of the Bureau of Land Mangement29/ shifted somewhat over these years as the number of protests increased. In 1961 the relevant provision of the Department regulations30/ required only that "lands occupied by Indians, Aleuts and Eskimos, in good faith will not be subject to entry or appropriation by others." (Emphasis

added.) Protests filed for lands falling beyond the narrow scope of the regulations were thus dismissed. The corresponding position of the Regional Solicitor of the Department was to recognize only protests based upon occupancy ultimately leading to grant of allotments under the Alaska Native Allotment Act. Claims based solely on Indian title were to be dismissed. However, in 1962 appeals from dismissals of Native land claims had reached the office of the Director of the Bureau and beginning in 1963 the Director transferred all Native protests to the central office in Washington, D.C. for consideration.31/

Despite this increased sensitivity to the mounting Native claims, Interior decided to proceed with the September, 1966 North Slope opening as scheduled. But by this time, Native groups had become so organized that the protests in response to the opening were almost immediate.32/ At this juncture Secretary Udall determined that further leasing activity on the questioned North Slope lands should be temporarily brought to a halt.

By memorandum dated October 13, 1966, the Regional Solicitor instructed the State Director of the Bureau to suspend any issuance of leases in areas affected by Native protests.33/ In turn, the State Director notified the Fairbanks Land Office of the suspension on pending and future applications for

leases within the areas under protest. The Fairbanks office was instructed to give notice to the affected parties.34/ A press release to this effect was issued by the Bureau's Anchorage office on November 28, 1966.35/

On November 30, 1966, the Anchorage Land Office issued a public notice which confirmed that the opening would proceed as scheduled, the drawing of simultaneous filings to be held on December 20, 1966. However, the notice added:

> The Native residents of the area have asserted an aboriginal claim to the area and have protested any form of disposition of the land or its resources. The Secretary of the Interior has, therefore, issued instructions to determine successful drawees among the offerors, but to postpone issuance of the leases until the question of the aboriginal claim is further considered.
>
> Upon determination of the successful drawee for each leasing block the first year's rental will not be returnable, unless the offer is rejected. At this time there is no estimate as to when or if the leases will be issued.36/

On November 30, 1966, a similar notice was posted in the Fairbanks Land Office and published the next day in the local newspaper, the Fairbanks Daily News Miner.37/ It stated in relevant part:

> Because the North Slope Native Association has filed claims to the area and has protested the disposition of the land or its resources, the leases won in the drawing will not be issued until Native claims are resolved.
>
> It is not known when the leases will be issued.
>
> Those who have filed bids for leases may withdraw their bids before the drawing. After winners of the leases are drawn, the winners are committed to pay the first year's rent on the land. This rent is not returnable.38/

On December 1, 1966, Secretary Udall issued a notice, published December 8, 1966 in the Federal Register, announcing the suspension of any lease issuance pending consideration of the protests.39/

Bureau of Land Management records indicate that of 1131 acceptable simultaneous offers filed, 342 were withdrawn prior to the date of the drawing, and

24 more were withdrawn on December 20, 1966, prior to commencement of the drawing. The records further reveal that the bulk of these withdrawals occurred after November 28, 1966.40/

The drawing was held as scheduled and the Rowe plaintiffs were among those who drew priority status. The Rowlett plaintiffs filed offers for various blocks of land within the 16 million acre area designated by Public Land Order, both before and after the Atlantic Richfield mid-1968 discovery of oil at Prudhoe Bay. In 1969, the Secretary issued Public Land Order 4582 41/ formally withdrawing all public lands in Alaska from mineral leasing, "for the determination and protection of the rights of the Native Aleuts, Eskimos and Indians of Alaska."42/

In the wake of the land freeze Congress began considering several proposals for settlement of the Native claims for the benefit of both the Natives and the continued orderly development of Alaska. In December 1971, Congress enacted the Alaska Native Claims Settlement Act. The Act expressly extinguished all past or future claims for land or damages arising from aboriginal title.43/ In return, the Natives were granted a monetary settlement of some one billion dollars44/ and allowed to select limited quantities of lands from large tracts withdrawn by Congress under § 1610.45/ The Settlement Act also established

twelve Native Regional Corporations, including the Arctic Slope Regional Corporation and smaller Village Corporations to manage the settlement for the benefit of their members.46/ Under provisions of ANCSA § 12(a),47/ Village Corporations were allowed to make selections from lands Congress had withdrawn in § 11 48/ of the Settlement Act. The Act provided that the Village Corporations would receive patent to the surface estate and the Regional Corporation would receive patent to the subsurface estate in equal amounts. In the event the quantity of lands to which a Native corporation was entitled under Sections 12 and 14 49/ proved greater than the available withdrawn lands, Congress provided in § 11(a)(3) 50/ that the Secretary would withdraw additional lands, or "deficiency withdrawals," from which the Natives could make the balance of their entitlement.

In part due to the existence of Naval Petroleum Reserve No. 4 and the Arctic National Wildlife Refuge, the Arctic Slope Regional Corporation was unable to make its allowable selections from the withdrawn lands. Accordingly, by a complex multi-step procedure, a sufficient "deficiency withdrawal" was arrived at by the Secretary.51/ The additional withdrawal included lands for which plaintiff lease applicants had previously filed oil and gas lease offers. Subsequently, the Regional Corporation selected the balance of its entitlement and in the fall of 1976 the

Bureau approved an interim conveyance of the lands selected from the deficiency withdrawal.52/ Part of the lands selected by the Regional Corporation included the same lands for which lease offers under the Mineral Leasing Act had been filed by plaintiffs.

This is the backdrop against which plaintiffs' claims for oil and gas leases are to be considered.

II. THE ADMINISTRATIVE PROCEEDINGS.

The interim conveyance of the lands selected by the Regional Corporation from the "deficiency withdrawal" lands was appealed to the Alaska Native Claims Appeal Board. In view of the serious issues raised in the appeals the Secretary undertook to assume direct jurisdiction over the claims.53/ In his decision of November 24, 1976, the Secretary dismissed the appeals and approved the conveyances. This decision constituted the final action by the agency. On November 30, 1976, an interim conveyance of the lands was made to the Arctic Slope Regional Corporation.54/ This lawsuit followed.

III. THE ROWLETT CLAIMS

A. Was the Secretary Required to Take Action Accepting or Rejecting Lease Applications Prior to November, 1976?

It has long been recognized as a cardinal principle of statutory construction that an agency interpretation of its own regulations is entitled to great weight within areas of agency expertise.55/ However, courts are not obliged to "stand aside and rubber-stamp [agency] affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying the statute."56/

> [O]ne factor to be considered in giving weight to an administrative ruling is "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking in power to control."57/

The Rowlett applicants filed over-the-counter offers from late 1966 through mid-January, 1969, at which time the Secretary issued PLO 4582. These offers were made pursuant to the Secretary's opening orders and 43 C.F.R. 3123. Unlike the Rowe plaintiffs, there was no cut-off date beyond which these applicants were barred from withdrawing their offers (and the advance rentals which had accompanied them). Prior to the time the Rowlett applicants filed their offers the Secretary and the Bureau had made it

amply clear, through several notices, that a large degree of uncertainty surrounded the entire North Slope leasing program, and the prospect of future leases being executed was subject to considerable doubt.

Plaintiffs have advanced several arguments in support of their position that the Secretary should have issued leases to them during these interim years, and that they justifiably expected such action. In light of the undisputed facts, I am not persuaded by plaintiffs' arguments in favor of departing from authoritative decisions regarding Departmental issuance of oil and gas leases to over-the-counter lease applicants. It has been squarely held in this Circuit that in the leasing of lands under the Mineral Act,

> The permissive word "may" in Section 226(a) allows the Secretary to lease such lands, but does not require him to do so. Although Section 226(c) requires the Secretary to issue the lease to the first qualified applicant if the land is leased, the Secretary has discretion to refuse to issue any lease at all on a given tract. (citations omitted).
>
> Given the Secretary's discretion whether to lease the lands at all, plaintiffs'

> offer to lease could not, in and of itself, vest plaintiffs with any right to a lease . . . Burglin v. Morton 527 F.2d 486, 488 (9th Cir. 1976) (emphasis added).58/

Moreover, the Court of Appeals for the District of Columbia Circuit held in Schraier v. Hickel,59/ that the pendancy of an applicant's offer could not interfere with a state selection because (1) "[t]he fact that the Bureau published a notice that it would receive offers to lease did not preclude a later exercise of discretion to decline to lease" and (2) an "application for lease, even though first in time or drawn by lot from among simultaneous offers, is a hope, or perhaps expectation, rather than a claim."60/ (Emphasis added.) These holdings were but recently reaffirmed in an appeal taken from a decision of this court dismissing a similar challenge by over-the-counter applicants who filed offers in 1967 and 1968, offers rejected by the Secretary in favor of subsequent State selections authorized under the Statehood Act.61/

[1,2] I conclude that the Rowlett applicants had no cognizable contract or property interest which created a right to issuance of leases. The discretion of whether or not to lease is not exercised when a mere notice is given inviting offers and delineating procedures to be followed. As the District of Columbia Circuit determined

in Duesing v. Udall 62/ "the filing of an application which has not been accepted does not give any right to a lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved." The Secretary was under no requirement to issue or reject leases within a certain time limit, since "it was the clear intent of Congress to give him discretion."63/ In view of these authorities and the events relevant to the 1966 drawing, I find plaintiffs' claimed expectations totally unwarranted.64/ No action based upon the Secretary's inaction may lie.

[3] Plaintiffs also argued in their moving papers and at oral argument that even under the limited right of fair consideration recognized in Schraier, this Court should find that the plaintiffs were not fairly treated vis-a-vis the defendant Native Regional corporation which ultimately received patent to the land. The error in this argument is rooted in plaintiffs' misunderstanding of this procedural safeguard: the right to be fairly and equally considered applies only among competing lease applicants, not between the applicants and the Natives whose rights were created and vested under other legislation. The Statehood Act recognized and preserved Native rights; thereafter Congress respected these rights through a land and monetary settlement. While Congress could have

chosen to recognize an equal or superior right in plaintiffs, it did not do so. Consequently, since plaintiffs do not complain of a lack of fair treatment vis-a-vis other lease applicants, the Schraier safeguards have indeed been fully respected.

B. Did the Secretary Properly Reject Plaintiffs' Lease Applications?

[4] In the course of affirming the Bureau's interim conveyance of ANCSA lands to the Arctic Slope Regional Corporation, the Secretary rejected all pending oil and gas lease applications filed for the same lands, or any part thereof. In so doing, he reasoned that (1) ANCSA § 1621(i) 65/ did not authorize the issuance of leases on lands subject to conveyance to Native corporations; (2) the discretion embodied in § 226 of the Mineral Act allowed the Secretary to continue the Department's policy regarding nonleasing of lands arguably subject to Native claims (the policy behind the earlier land freeze) in order not to frustrate Congressional policy in the Settlement Act; (3) issuance of leases in 1976 would "nullify the years of policy decision and withdrawals preventing lease issuance in order to protect the rights of Alaska Natives"; (4) the offerors were not due greater deference due to suspension, rather than rejection, of their applications during the period of Secretarial withdrawals from leasing in aid of legislation.66/

Arnold v. Morton stands for the proposition that the Secretary, in granting or refusing to grant leases, must act upon grounds "which would have been within his discretion at the time of plaintiffs' filing."67/ However, in a footnote the Court elaborates that due to the absence of any time limit on Secretarial Action,

> We do not mean to suggest that the Secretary must go through the mental gymnastics of attempting to make the decision he would have made at the time of application. We mean only that a public land order which was issued at a time when the Secretary was laboring under a mistake of law cannot in and of itself be a proper ground for the exercise of the Secretary's discretion to refuse the leases. Id. at 1106, n. 12.

In the text, the Court adds,

> [W]hile he may not refuse to grant a lease on the basis of the later public land orders per se, it would clearly be appropriate to consider whether the factors which led to the issuance of those orders also indicate that it is not in the public interest to lease the lands in question

> at this time. (Emphasis added). Id. at 1106.

While it may be true that some of the Secretary's reasons in his November 24, 1976, decision went beyond the Arnold admonishment, I find that given the latitude in the Arnold standard, the Secretary reasonably and sufficiently grounded his rejection of plaintiffs' lease offers upon factors clearly in existence in the period from 1966 to 1969, e. g., serious questions had been raised, via Native protests, concerning the status of Native aboriginal rights, and it had become certain that Congress would finally undertake the settling of Native aboriginal claims in Alaska.68/

While plaintiffs strongly urge that identical factors were involved in all four openings, the record reveals otherwise; the Native response in protest against the fourth opening was immediate and strong, no doubt in large part due to the Bureau's actions in the three earlier openings. Essentially the Secretary found that the same reasons which supported the land freeze policy of 1966 justified rejection of the lease offers. That this policy was in existence in 1966 is further evidenced by the Department's submission soon thereafter of a draft bill to settle the Native claims. For the Secretary to have intervened in this area by issuing leases would have usurped the reservations of power in Congress declared in the Statehood Act, usurped

the intent of Congress to ultimately deal with Native rights, and would have seriously prejudiced the rights of Alaskan Natives. I cannot say that such a position was irrational, untimely or beyond the scope of the Secretary's broad discretion under the Mineral Act to refuse to issue oil and gas leases. And while there may be several competing opinions as to what action would have been in the public interest, the decision of the Secretary under the circumstances appears to be entirely reasonable and objective.

C. Objections to Interior Appeal Procedures.

When plaintiffs objected to the interim conveyance of selected lands to the Regional Corporation (under ANCSA) an appeal was lodged with ANCAB. However, prior to a decision in the matter the Secretary assumed original jurisdiction over the appeal, under authority of 43 C.F.R. 4.5 (April 15, 1971). Also involved in the appeals were the still-pending oil and gas lease applications of plaintiffs. Because of the interrelatedness of the ANCSA and Mineral Leasing Act Claims, the Secretary took original jurisdiction over the lease applications as well, under authority of Section 226 of the Mineral Act and 200 Departmental Manual 1.9.

Plaintiffs argue that this assumption of jurisdiction, as well as the

absence of a hearing, deprived them of their rights under the Administrative Procedure Act, the Department's regulations, and the Due Process Clause.

[5] In regard to the Secretary's assumption of original jurisdiction, Subchapter 4.5, Title 43 of the Code of Federal Regulations unambiguously states in part:

> Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by law. The Secretary reserves under his supervisory powers the right to take original jurisdiction of any case and render the final decision in the matter, after holding such hearing as may be required by law. . . . (Emphasis added).

Given the clear language of this provision, I find plaintiffs' position regarding the assumption of jurisdiction absolutely untenable. The Secretary's action was an act of discretion, not an abuse thereof.69/ Under the language of the Mineral Leasing Act itself, the Secretary is delegated the discretionary authority to act upon lease applications. Although ordinarily the Bureau performs this function, these applications did not arise in any ordinary situation. I find the Secretary's decision to review the appeal and the lease applications to be a decision

well within his discretion and not subject to review in this Court.

I also reject plaintiffs' position that since the Government did not have sufficient time to file briefs in opposition to plaintiffs' appeals, plaintiffs' rights were somehow prejudiced. Plaintiffs were able to file a comprehensive and well-considered 59-page appellate brief with the Board. Accordingly, I find no prejudice.

[6] Finally, in regard to the absence of a hearing, plaintiffs argue that applicable regulations required a hearing before the Secretary prior to issuance of a decision, a hearing in which evidence could be heard and reviewed. Plaintiffs conclude from the Secretary's failure to hold a hearing that their due process rights were violated. Without reaching defendants' argument based upon Rose v. Kleppe, No. 75-1152 (D.D.C. July 29, 1976) that plaintiffs' interests in the land did not rise to an interest protectable under the due process clause, I find that the absence of a hearing was proper in this instance. The Department's hearing regulations provide for evidentiary hearings in appeals before the Interior Board of Land Appeals70/ and the Alaska Native Claims Appeal Board.71/ The two regulations are substantively identical and provide that a hearing "on an issue of fact" may be held in the discretion of the Board. The Secretary found that in

these appeals there were no unresolved issues of fact which might be dispositive of the case, and that the questions raised were purely legal questions.72/ In light of this finding, well supported in the record, the Secretary properly exercised his discretion not to order a hearing. Plaintiffs' motion on this ground is also denied.

D. Did the Pickett Act Require the Secretary to Issue a Public Land Order in 1966?

[7] Plaintiffs have argued in their briefs that even if the Secretary generally had discretionary authority under the Mineral Leasing Act to reject lease offers after the date of the drawing, in the fall of 1966 the Secretary issued several notices to the effect that action on lease applications for the North Slope would be suspended, not rejected, until further consideration was given to the claims of aboriginal title asserted by various Native groups. Plaintiffs argue that this action, having not been accomplished through means of a public land order declaring a withdrawal, exceeded the Secretary's authority given the proscriptions of the Pickett Act.73/

The Pickett Act provided that the President, acting through the Secretary of the Interior, could

> "at any time in his discretion, temporarily withdraw

> from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for . . . classification of lands, or other public purposes to be specified in the orders of withdrawals . . .."74/

When Executive Order 10355 was signed, delegating the Act's authority to the Secretary, it provided in Section 1(b) that:

> All orders issued by the Secretary of the Interior under the authority of this order shall be designated as public land orders . . ..

Nothing in the Pickett Act restricted the manner in which the Secretary was to exercise his authority over public lands when such action was based on grants of authority derived from other Acts of Congress. By its own terms the § 1(b) restriction applied only to orders issued under authority of the Pickett Act. When the Secretary acted under the authority of the Mineral Act to suspend Bureau action on lease applications, he was beyond the reach of the Pickett Act and therefore not required to act exclusively through issuance of a public land order.

To hold otherwise would be equivalent to declaring that unless the

Secretary accepts or rejects lease offers immediately upon receipt thereof, he must issue a public land order announcing a withdrawal of the subject lands. Then, when he is ready to act, he must issue a revocation of the order in the form of another public land order. Given the intent of Congress in the Mineral Act to grant broad discretion to the Secretary on whether or not to lease public lands, I do not agree that Congress intended each such discretionary action to constitute a "Pickett Act" action. There is no support for such a position in either act, and counsel have pointed to none in their briefs. Rather, at least one Court of Appeals that has addressed the argument has endorsed the Department's interpretation of the Pickett Act set forth in Richard K. Todd, et al., 68 I.D. 291, 296, in which then Assistant Secretary Carver observed

> Stripped of all authority to withdraw lands, the Secretary would still have his discretionary authority to refuse to issue leases where he thinks issuance would not be in the public interest.
>
> The formal exercise by the Secretary of his discretionary authority is nothing new in the administration of the Mineral Leasing Act.75/

I find this reasoning persuasive and therefore conclude that the Secretary's decision to withhold action on numerous North Slope leasing applications was well within the discretion granted in the Mineral Act and did not contravene the constraints of the Pickett Act.

On the basis of the above discussion I conclude that plaintiffs' over-the-counter applications for oil and gas leases, filed in response to a departmental invitation to submit such offers on specified lands, did not confer any substantial contract or property rights upon the applicants. Despite the "invitation," the law is well settled that the Secretary did not forfeit any discretion to consider and reject such applications at any time in the future. I further conclude that the Secretary properly based his rejection of plaintiffs' lease offers upon a reasonable belief that issuance of leases was not in the public interest.

E. Were the "Deficiency Withdrawals" in the North Slope Region an Abuse of Discretion by the Secretary of the Interior?

[8] Plaintiffs have argued that the process by which ANCSA deficiency withdrawals were computed76/ for selection by defendant Regional Corporation was arbitrary, capricious and an abuse of discretion. I find this argument without merit.

At the outset, it should be observed that based on plaintiffs' failure to establish a cognizable property interest in the lands withdrawn by the Secretary, plaintiffs face a serious standing problem77/ in challenging the propriety of the ANCSA § 11(a) withdrawals and subsequent conveyances to defendant Regional Corporation.

Nevertheless, even if standing to raise this argument were established by plaintiffs, the claim of arbitrariness must be rejected. Upon examination, the process by which the deficiency withdrawals were computed demonstrates a responsible and rational exercise of discretion by the Secretary.

In fulfilling his responsibility under ANCSA, then Secretary Morton created an Alaska Task Force78/ in January 1972, to determine the location, amount and type of public land withdrawals needed to comply with the Act.79/ The affidavits submitted by the government regarding the withdrawal calculations for the Arctic Slope region detail the groundwork done by ATF's working group, including the step-by-step calculations which led to the determination of necessary Village and Regional Corporation deficiency withdrawals, and the consideration of other withdrawals required by ANCSA.80/ These preliminary results were presented to ATF in February 1972. Following consultation with representatives of Native groups, ATF directed its working

group to outline the necessary withdrawals based upon certain additional determinations, including the order of priority in which entitlements would be satisfied.81/ The working group proceeded to plot out the actual lands involved and these map plottings formed a basis for the overall public land orders issued in March 1972.82/

As attested to by Mr. Bingham, former Chief of the Division of Lands and Realty for the Bureau, the task of determining the proper withdrawals needed for the Arctic Slope region raised unusual problems.

> Due to the size and configuration of the Arctic Slope region, its few villages, the existence of [naval] Petroleum Reserve No. 4, the Arctic National Wildlife Range, State selections at Prudhoe Bay and the [oil pipeline] utility corridor, there was a substantial deficiency factor for the region.83/

In the ensuing months the ATF working group continued to update its statistical information and to revise the assumptions upon which the withdrawals had been based.

In September 1972, a delegation from defendant Regional Corporation met with members of ATF to discuss numerous differences of opinion as to the manner

in which ANCSA § 11(a)(3) deficiency withdrawals had been computed. Among other things, the Regional Corporation challenged many of the assumptions upon which the initial withdrawals had been made. Following three days of discussion and consultation between the parties and the Secretary, the Secretary and ATF agreed, based upon revised calculations, that the acreages withdrawn in the Arctic Slope region as regional deficiency withdrawals should be augmented by 1,215,568 acres.84/ A public land order amending the earlier March 1972 withdrawal was, in turn, issued.85/

Nevertheless, insufficient knowledge concerning many factors resulted in certain continuing inadequacies. In September 1973, it was again necessary to modify the acreages based upon newly-acquired enrollment data and revised statistics.86/ Five subsequent public land orders were required before the withdrawal process was finally completed, based on the best information available at the time, in December 1975.87/ It was from these combined withdrawals that defendant Regional Corporation ultimately filed their selection applications which were later approved by the Bureau in 1976. 88/

Given the highly complex nature of the calculations involved in establishing the necessary deficiency withdrawals, and the continuing efforts of the Department over the course of four

years to modify and revise the withdrawal calculations as errors and new information came to its attention, I conclude that the deficiency withdrawal process employed by the Department was not arbitrary or capricious, nor did it constitute an abuse of discretion. Indeed, the government has shown that the utmost care and consideration was given to this labyrinthine undertaking. The evidence is uncontroverted in this regard and therefore plaintiffs' motion on this ground is also denied.

F. May Plaintiffs Claim Protection Under ANCSA's "Savings Clause"?

[9] Because of my finding that plaintiffs lacked any substantive rights whatsoever in the ultimate award of leases, it follows inescapably that plaintiffs cannot claim any protection from the savings clause of ANCSA, § 14(g), which clause preserves "valid existing rights."89/ The Schraier court convincingly demonstrated that the rights of lease applicants cannot rise above an inchoate hope or expectation such as would draw plaintiffs within the protection of the Alaska Statehood Act's savings clause. Since ANCSA's savings clause is notably more restrictive than that of the Statehood Act,90/ the Secretary correctly concluded that plaintiffs' claim must similarly fall beyond reach of the Settlement Act.91/ Accordingly, the Secretary's decision in Arctic Slope is affirmed in all respects; defendants'

motion for summary judgment on all issues is granted. Plaintiffs' motion is denied.92/

IV. THE ROWE PLAINTIFFS

As more fully described in Part I, supra, the Rowe plaintiffs differ from the Rowlett plaintiffs in that they filed simultaneous offers within a pre-set deadline. Prior to the date of the drawing these applicants could withdraw their offers, and recoup the prepaid first-year's advance rentals. However, after the drawing the offers could not be withdrawn, nor could the prepaid rentals be recouped unless the Secretary took action and rejected the offers. In return for this more restrictive procedure, the Rowe plaintiffs acquired a priority to entitlement to leases, should leases be issued. Thus, these "first shot" plaintiffs were spared the uncertainty of having to file first-in-time to get priority status. The Department also benefited from these procedures by (1) avoiding any frenetic rush to file offers on the first day of the land opening, and (2) eliminating to a large degree the chance for brokering of priorities by speculators.

[10] The non-returnability of the first-year's rental had been announced in the September 1966 opening notice as one of the filing requirements necessary for an offer to be eligible for the drawing.93/ Plaintiffs argue that

while not explicitly stated in the notice, this provision for non-returnability indicated that the Department agreed to be bound to issuance of leases to successful drawees. I disagree.

The opening notices published in the Federal Register made it abundantly clear that the filing of an application constituted an "offer to lease,"94/ and that the applicant agreed he would be bound to a lease "if such a lease is issued to him as a result of the drawing." Nowhere in the notice is there mention that the non-returnability provision altered the Secretary's traditional discretion over whether or not to lease.

The Secretary's purpose in changing the last three opening notices in respect to the non-returnability of the first-year's rental was solely to prevent an obstructive practice of certain applicants who would withdraw their first-drawn offers, after the drawing but prior to lease issuance, if they were unsuccessful in bartering their lease priority. Under prior practice speculators could file offers on numerous blocks of land, tendering the nominal $10.00 filing fee per offer. If any of the offers became "first-drawn" offers following the drawing, the speculators would seek to sell those offers to a third party, for a profit. If a lease could not ultimately be sold, the first-drawn offer

was withdrawn before any leases were executed. The non-withdrawal provision for advance payment of the first-year's rental was a remedial measure designed to discourage such speculation (and the resulting obstructive effect on the Bureau office) and to require offerors, as defendants so aptly state, to "cover their bets."

Paragraph 3(d) of the first opening notice had not put a halt to the speculators because it seemed to allow for withdrawal of lease offers anytime prior to execution of a lease.95/ As a result, the several exhibits offered by plaintiffs evidence a clear recognition within the Bureau that a clearer provision for non-returnability after the drawing would remedy the recognized abuse.96/

The documents uniformly reveal a singular Bureau intent in the notices to provide for a non-returnability policy that would be consistent with the regulations in existence at the time; particular accounting procedures were never intended to add more to this limited goal.97/ There is no support anywhere for plaintiffs' theory that paragraph 3(d) of the notice was somehow also intended to alter the established policy and requirements of law98/ that lease acceptance remain within the full discretion of the Secretary up until a designated government official had executed leases in favor of priority-holding applicants.

It cannot be disputed that, as plaintiffs urge, the opening notice would never have issued had the Department not determined that it desired to take the first steps in leasing the subject North Slope lands. However, it is equally well established in the Mineral Act, the interpretative regulations, and the authorities cited in Part II, B, above, that the Secretary's ultimate discretion to accept or reject a lease offer was not in any way reduced by the issuance of the notice.

Two other points are significant in this matter. First, paragraph (d) of the notice, in addition to the regulations,99/ clearly contemplated that during the period following the drawing (when the offers and advance rentals could not be voluntarily withdrawn) the Bureau could reject a lease offer and be required to refund the advance rental; if such a rejection occurred the notice went on to provide that the advance rentals would be returned to the rejected applicant. By its own terms that provision is unrestricted as to the possible bases for rejection of an offer. Plaintiffs' reading of this same provision would urge that a rejection based upon a non-compliance with the regulations was within the intended scope of paragraph (d), but that a rejection based upon the Secretary's discretion under § 226(c) of the Mineral Act was not intended to be within its scope. I find nothing in any of the notices, or

the regulations, to support plaintiffs' reading.

Second, the Department's own regulations, in force at the time, explicitly stated that acceptance of a lease offer would be indicated by the exclusive method of the Secretary's signature on the lease form.100/ The September notice provided in paragraph (a) that "the provisions of this notice shall supersede any provisions of the regulations with which they may be in conflict." But it also provided that absent a conflict, the regulations in 43 C.F.R. Part 3120, were to govern. Although there are clear departures from the regulations in certain procedures to be followed by lease applicants (i.e., the use of the new drawing card), the language of the opening order--and the underlying administrative intent--reveal no departure in the area of acceptance of lease offers. Rather the notice is entirely consistent, as is its counterpart in § 3123.9(c)(3) of the regulations, with the acceptance-by-execution provisions of 43 C.F.R. § 3123.5(b). The reference in ¶ 3(c) of the notice regarding possible issuance of leases further supports this reading. Finding no conflict between the notice and the lease execution provisions of the regulations, I conclude that acceptance of a simultaneous lease offer could not have been indicated in any manner other than by a signature of the appropriate officer on the lease form.

FOOTNOTES:

1/ See, e.g. Burglin v. Morton, 527 F.2d 486 (9th Cir. 1975), cert. denied, 425 U.S. 973, 96 S.Ct. 2171, 48 L.Ed.2d 796 (1976); Burglin v. Kleppe, Nos. A75-113, A75-232 (D.Ak. Dec. 29, 1976), affirmed by memo. op. 582 F.2d 1289 (9th Cir. 1978); Rowe v. Kleppe, No. 75-1152 (D.D.C. July 29, 1976).

2/ 30 U.S.C. § 181 et seq. (hereinafter "Mineral Leasing Act"). Plaintiffs' lease applications comprise a total acerage in excess of 1,000,000 acres.

3/ Hereinafter "the Secretary".

4/ Hereinafter "Regional Corporation".

5/ 43 U.S.C. § 1601 et seq. (hereinafter ANCSA). In settlement of aboriginal claims the Act provides for Native selection of 40,000,000 acres of federal land, and a monetary award of $1,000,000,000.

6/ In re Arctic Slope/Western, ANCAB No. RLS 76-11(A)-(MM); In re Arctic Slope/Eastern (Central), ANCAB No. RLS 76-12(A)-(O) (hereinafter Arctic Slope).

7/ Plaintiffs also allege claims based upon, (1) breach of contract in the failure of the Secretary to execute leases; (2) procedural and substantive due process claims arising out of the Secretary's "land freeze" suspending any disposition of federal lands; (3) a procedural due process claim arising out of the Secretary's assumption of original jurisdiction over plaintiffs' appeals pending before the Alaska Native Claims Appeal Board, and; (4) a suit to quiet title to the lands in question.

8/ U.S. Inupiat Community of the Arctic Slope v. Atlantic Richfield Company, 435 F.Supp., 1005 (D.Ak. June 3, 1977). Similarly fn. 10, 43.

9/ Act of May 25, 1926, Ch. 379, § 1, 44 Stat. 629, 43 U.S.C. § 733. This program permitted townsites to be established through the supervision of a townsite trustee. After a subdivisional survey was drawn, patent to occupied lots was transferred to the occupants.

10/ See generally, Inupiat Community, supra at 5-7.

11/ Act of July 7, 1958, Pub.L. No. 85-508, 72 Stat. 339, as amended, 73 Stat. 141, 48 U.S.C. Prec. § 21 note (hereinafter Statehood Act).

12/ Id. at Section 4.

13/ H.R.Rep. No. 624, 85th Cong., 2d Sess. pp. 1-2 (June 25, 1957), 1958 U.S.Code Cong. & Admin. News, p. 2933.

14/ Statehood Act, supra note 11, Section 28.

15/ PLO 1621, 23 Fed.Reg. 2637 (April 22, 1958). Prior to PLO 1621 these lands had been reserved in connection with the prosectuion of World War II. The lands opened to leasing by PLO 1621 were all those lands (except Naval Petroleum Reserve No. 4 and the pending Arctic Wildlife Range) lying north of the crest of the Brooks Range and the DeLong Mountains, from the United States-Canada border to Cape Lisburne and the Arctic Ocean.

16/ Prior to this "opening" there had been leasing in Alaska, although largely confined to the Kenai Peninsula. However, some leasing activity did involve lands within the northern half of Alaska, deemed by the Department to be within its Fairbanks Land District.

Lands in the Kateel River area were filed on in August, 1954. Lands in the Kuskokwim area were filed on in 1958. Daniel A. Jones, Manager, Fairbanks Land Office, Oil and Gas Leasing on the North Slope, Alaska (Mar. 20, 1964) (paper presented at the Seventh Annual Mining, Minerals and Petroleum Conference at College, Alaska) at 5.

17/ PLO 1621, ¶ 4, note 15, supra.

18/ The two areas comprised 3.4 million acres and were opened to noncompetitive leasing on July 1, 1958. A simultaneous drawing was held on October, 1958, and ultimately less than half was leased. By the mid-1960's nearly all of the acreage had been leased.

19/ The acreages to be leased were: (I) 3,600,000; (II) 4,775,000; (III) 6,995,000; (IV) 4,865,000. See paper by Jones at p. 10, cited note 16, supra. The Department did subsequently open these lands to lease offers in 30 Fed.Reg. 898 (Jan. 28, 1965); 30 Fed. Reg. 11697 (Sept. 11, 1965); 31 Fed.Reg. 4741 (March 19, 1966). The general release of North Slope lands, PLO 1621, was amended in 1965 to reflect this particular set of openings and the leasing procedures which would be followed as portions of

the 16,000,000 acres became available. PLO 3521, 30 Fed.Reg. 271 (Jan. 9, 1965). Plaintiffs have referred to this program as the "special North Slope non-competitive leasing program."

20/ 30 U.S.C. § 226(a)-(c) provides in part:

> (a) All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.
>
> (b) If the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations . . .
>
> (c) If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding.

Such leases shall be conditioned upon the payment by the lessee of a royalty of 12 1/2 per centum in amount or value of the production removed or sold from the lease.

21/ 43 C.F.R. 3123.9(c) (1964).

22/ The general regulations governing noncompetitive leasing at the time of the 1966 notice of availability may be found at 43 C.F.R. 3120, et seq. (1964) as amended. Part 3123.9 governed the "simultaneous filing" program; Part 3123.1 governed the "over-the-counter filing program. It should be added, however, that provision was made in the Federal Register that the notices would overrule any inconsistent prior regulations. See text accompanying note 100, infra.

23/ 31 Fed. Reg. 12575 (Sept. 23, 1966).

24/ Id. The Notice also provided that by signing and submitting the requisite "Special Oil and Gas Drawing Entry Card" the applicant would be bound to a lease "if such a lease [were] issued to him as a result of the drawing." The applicant was further required to include a $10.00 filing fee and the first

> year's advance rental. This advance rental was returnable, up until the day of the drawing (if an offer was withdrawn) and thereafter if an offer was rejected either during or after the drawing. However, if an applicant became a "successful drawee" for a particular block of land, and his offer was not rejected, the rental was deemed earned and deposited in the U.S. Treasury.

The September notice provided in pertinent part:

> (3) On the date the approved leasing maps are officially filed in the Fairbanks District and Land Office, the lands described therein will become available for noncompetitive oil and gas leasing pursuant to the Mineral Leasing Act, . . . the regulations in 43 C.F.R. Part 3120, and the provisions of this notice. The provisions of this notice shall supersede any provisions of the regulations with which they may be in conflict.
>
> * * *
>
> (b) Offers to lease these lands in the manner set out in paragraph (c)

may be filed in the Fairbanks District and Land Office of the Bureau of Land Management from 10 a.m. on September 26, 1966, until 4 p.m. on November 18, 1966. Such offers will be considered as having been simultaneously filed.

(c) Offers to lease must be submitted on a "Special Oil and Gas Drawing Entry Card" Form 4-1720, signed by the applicant. The card will constitute the applicant's offer to lease the described block of land by participating in the drawing to determine the successful drawee. By signing and submitting the entry card, the applicant agrees that he will be bound to a lease on Form 4-1158 for the described block if such a lease is issued to him as a result of the drawing. . . . The entry card must be accompanied by a $10.00 filing fee and the first year's advance rental for the total area as shown on the appropriate approved leasing map. . . .

(d) Upon the determination of the successful

drawee for a particular block, the first year's rental will be earned and deposited in the U.S. Treasury, and will not be returnable. However, if an offeror withdraws his offer to lease prior to the beginning of the drawing or if his offer is rejected, the advance rental will be returned to him. . . .

(e) Any lands not included in offers to lease filed during the simultaneous filing period, or in offers which are withdrawn before the drawing, will become subject to leasing, as of 10 a.m. on November 21, 1966, in the usual manner on a priority of filing time basis and in accordance with the regulations in 43 C.F.R. 3120. . . .

(f) If a successful drawee is unqualified to receive a lease, the lands in the leasing block shall be included in a special simultaneous filing procedure to be announced at a later date by the Manager, Fairbanks District and Land Office.

* * *

25/ See note 19 supra.

26/ See Rowlett complaint at 3. The first-in-time priority of these offers as against subsequent lease offers is set out in 43 C.F.R. Part 3123.(1)(b).

27/ E. g., Alaska Federation of Native, North Slope Native Association.

28/ Federal Field Committee for Development Planning in Alaska, Alaska Natives and the Land, at 440, 456-459 (1968).

29/ Hereinafter "Bureau."

30/ 43 C.F.R. 2013.9.3.

31/ See note 28 supra.

32/ Suit was brought in Federal District Court by the Arctic Slope Native Association (defendant ASRC's predecessor) on October 4, 1966, for a permanent injunction against the leasing. Inupiat Eskimos v. Bureau of Land Management, Civ. No. F26-66 (D.Ak. 1966). On plaintiff's motion, the action was dismissed without prejudice three weeks later. Plaintiff revealed in his moving papers that negotiations with the Department were proceeding at that time.

33/ Memorandum from Acting Regional Solicitor Cassity to State Director Silcock (October 13, 1966). All plaintiffs' offers to lease were for lands located within these areas.

34/ Memorandum from State Director Silcock to Fairbanks District and Land Office Manager. (October 21, 1966).

35/ Rowlett plaintiffs exhibit No. 1.

36/ Rowe plaintiffs' exhibit No. 55.

37/ Rowe plaintiffs' exhibit No. 54.

38/ The provision regarding withdrawal of bids merely restated what had been declared in the September notice.

39/ 31 Fed.Reg. 15494 (December 8, 1966).

40/ Affidavit of Sue A. Wolf, Chief, Selections and Leasable Minerals Section, Alaska State Office, Bureau of Land Management (Defendant's Attachment #3). The records also indicate that several of the Rowe and Rowlett plaintiffs were among those who withdrew lease offers (at least 53 offers).

41/ 34 Fed.Reg. 1025 (January 23, 1969).

42/ The events leading to the PLO 4582 withdrawal are explained in the Secretary's decision below:

> In mid-1968, Atlantic Richfield Co. announced its discovery of oil at Prudhoe Bay on lands leased by the State of Alaska. The announcement generated immense interest; in the next half year over 20,000 noncompetitive oil and gas lease offers were filed in Alaskan BLM offices, including offers which covered practically all potentially available land on the North Slope. The Department responded by issuing protective withdrawals, including PLO 4582, 34 Fed.Reg. 1025 (1969), which were designed to maintain the public land status pending legislation for the resolution of Alaska Natives' land claims.

Arctic Slope, supra, at p. 3.

43/ ANCSA § 4, 45 U.S.C. § 1603. See generally Inupiat Community, supra.

44/ ANCSA § 6, 43 U.S.C. § 1605. A sum of $462,500,000 was to be paid by the federal government over a period of 10 years. The remaining $500,000,000 payment

was to come from mineral revenues that would otherwise go to the State of Alaska.

45/ ANCSA § 12(a)-(c), 43 U.S.C. § 1611(a)-(c). The land settlement granted approximately 40,000,000 acres to the Natives.

46/ The other Regional Corporations include: Bering Straits Association, Northwest Alaska Native Association, Association of Village Council Presidents, Tanana Chiefs' Conference, Cook Inlet Association, Bristol Bay Native Association, Aleut League, Chugach Native Association, Tlingit-Haida Central Council Kodiak Area Native Association and Copper River Native Association.

47/ 43 U.S.C. § 1611(a).

48/ 43 U.S.C. § 1610.

49/ 43 U.S.C. §§ 1611, 1613.

50/ 43 U.S.C. § 1610(a)(3).

51/ The deficiency withdrawals were necessary to equalize the Regional Corporation's subsurface estate selection with the Village Corporations' surface estate selections. These withdrawals were accomplished through several public

land orders. PLO 5169, 37 Fed.Reg. 5572 (March 16, 1972), as amended by PLO 5236, 37 Fed.Reg. 18916 (September 16, 1972); PLO 5396, 38 Fed.Reg. 26376 (September 20, 1973). The deficiency withdrawals were also, in part, a result of pending Alaska Statehood Act selections, ANCSA § 3, 43 U.S.C. § 1602(e). See notes 78-88 and accompanying text, infra.

52/ 41 Fed.Reg. 36672 (August 31, 1976) and 41 Fed.Reg. 40193 (September 17, 1976).

53/ Order of Nov. 15, 1976, under authority of 43 C.F.R. 4.5 (1976), 30 U.S.C. § 226 and 200 Department Manual 1.9. A copy of the Secretary's final decision is attached hereto as an appendix.

54/ BLM Interim Conveyance Nos. I.C.-047 (November 29, 1976) Arctic Slope Western) and I.C.-048 (November 29, 1976) (Arctic Slope Eastern (Central)).

55/ Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

56/ S.E.C. v. Sloan, 436 U.S. 103, 118, 98 S.Ct. 1702, 1711-1712 56 L.Ed.2d 148, 156 (1978) quoting from Volkswagenwerk v. Federal Maritime Comm'n, 390 U.S. 261, 272, 88 S.Ct. 929, 19 L.Ed.2d 1090 (1968).

57/ Adamo Wrecking Co. v. United States, 434 U.S. 275, 287-388, 98 S.Ct. 566, 574, n. 5, 54 L.Ed.2d 538, 542 (1978) quoting from Skidmore v. Swife & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

58/ Hereinafter, Burglin I; see also Arnold v. Morton, 529 F.2d 1101, 1106 (9th Cir. 1976); McTiernan v. Franklin, 508 F.2d 885, 887 (10th Cir. 1975); Duesing v. Udall, 121 U.S.App. D.C. 370, 372, 350 F.2d 748, 750-751 (1965), cert. denied, 383 U.S. 912, 86 S.Ct. 888, 15 L.Ed.2d 667 (1966); Pease v. Udall, 332 F.2d 62, 63 (9th Cir. 1964); Haley v. Seaton, 108 U.S.App. D.C. 247, 260-261, 281 F.2d 620, 623-624 (1960); Burglin v. Secretary of Interior, Nos. A75-113 Civ. and A75-232 Civ. at 6 (D.Ak. Dec. 29, 1976) aff'd by mem. op. 582 F.2d 1289 (9th Cir. 1978); Rowe v. Kleppe, Civ. No. 75-1152 at 4-5 (D.D.C. July 30, 1976); McDade v. Morton, 353 F.Supp. 1006, 1010 (D.D.C. 1973), aff'd 161 U.S.App. D.C. 237, 494 F.2d 1156 (1974).

59/ 136 U.S.App.D.C. 81, 419 F.2d 663 (1969).

60/ At 84, 419 F.2d at 666.

61/ Burglin v. Secretary, Civ.Nos. A75-113, A75-232 (D.Ak. December 29, 1976), Aff'd by mem. op. No. 77-1655 (9th Cir. August 18, 1978) hereinafter Burglin II).

62/ 121 U.S.App.D.C. 370, 372-373, 350 F.2d 748, 750-751 (1965), cert. denied, 383 U.S. 912, 86 S.Ct. 888, 15 L.Ed.2d 667 (1966).

63/ Arnold v. Morton, 529 F.2d 1101, 1106 (9th Cir. 1976). See also Udall v. Tallman, 380 U.S. 1, 4, 85 S.Ct. 792, 13 L.Ed.2d 616 (1964), and cases cited in note 58 supra. Plaintiffs argue that the Secretary's failure to act on the lease applications for 10 years somehow violated the "legal protections" guaranteed in Schraier. However, the language in Schraier merely states that all applicants must have an equal opportunity to contract, that an application may not be rejected on a basis other than that permitted by law. As pointed out by the district court in Burglin II, and affirmed by the Ninth Circuit, the failure to make a decision on a lease application for several years is not an action contrary to law.

64/ While plaintiffs allege irreparable harm resulting from the Secretary's inaction during the period from 1966 to 1969 on pending oil and gas lease offers,

it is curious to note that many lease applicants actually requested such inaction, apparently in fear that were the Secretary not to delay action the lease offers would be rejected and any priority as an applicant would be lost. The claimants were gambling that the Congressional resolution of Native claims might not dispose of their applications. Ironically, plaintiff claimants, having lost their gamble, now choose to disregard their earlier position and urge as error, the Secretary's failure to act. Kirton affidavit at 7, Arctic Slope, supra, at 4. However, as the weight of authority clearly shows, the Secretary had no duty to act despite the existence of lease applications, a government notice that offers would be received, or the passage of years before final agency action. Burglin II, supra, at 8; Duesing, supra, 121 U.S.App.D.C. at 372-373, 350 F.2d at 750-751; Arnold, supra, at 1106. As discussed elsewhere in this opinion, the Schraier or Arnold limitations on this discretion did not affect the propriety of the Secretary's decision to defer consideration of accepting lease offers.

65/ This section must be read in conjunction with 43 U.S.C. §§ 1610 (a)(1)-(2), 1615(a). The Secretary also relied on 43 C.F.R. 2091.1(b).

66/ Arctic Slope, supra at 10-11.

67/ Arnold v. Morton, supra at 1106.

68/ Arctic Slope, supra at 11. As corroborated by an August 10, 1967 letter from Secretary Udall to then-Governor Hickel, the Department was very much aware at the time of Congress' reservation of power over the disposition of Native land claims expressed in Section 4 of the Alaska Statehood Act:

> As you know, the Congress has provided that the Alaska Natives '. . . shall not be disturbed in the possession of any lands actually in their use and occupation or now claimed by them, but the terms under which such persons may claim title to such lands is reserved for future consideration by Congress.' (Emphasis added)

Plaintiffs' Exhibit 41. See also Statehood Act, supra at Section 4. The Secretary feared that to act would contravene the spirit

of this provision and instead, hoped Congress would take up its reserved authority and legislate on the matter. Indeed, in a short time hearings were under way on various proposals, including the Department's with the 1971 Settlement Act as the result of those efforts.

69/ I might add that absent any offer of proof of malignant motivation on the part of the Secretary, I fail to see what possible prejudice this action could have wrought upon plaintiffs.

70/ 43 C.F.R. 4.911(c) (1975).

71/ 43 C.F.R. 4.415 (1975).

72/ Arctic Slope, supra at 12.

73/ 43 U.S.C. § 141-143; E.O.No.10355, 17 Fed. Reg. 4821 (May 26, 1952), (repealed 1976).

74/ 43 U.S.C. § 141.

75/ Quoted with approval in Duesing v. Udall, 121 U.S.App.D.C. at 372, 350 F.2d at 751 (1965).

76/ Under the Settlement Act, the Secretary is directed to follow a comprehensive and highly complex formula in withdrawing sufficient acreages from the public domain

to satisfy the statutory entitlement granted to Regional and Village Native Corporations. ANCSA Section 11(a)(1), 43 U.S.C. § 1610(a)(1) establishes a congressionally created "pool" of specific lands from which Native Corporations may make their selections:

> The following public lands are withdrawn, subject to valid existing rights, . . .:
>
> (A) The lands in each township that encloses all or part of any Native village identified pursuant to subsection (b) of this section;
>
> (B) The lands in each township that is contiguous to or corners on the township that encloses all or part of such Native village; and
>
> (C) The lands in each township that is contiguous to or corners on a township containing lands withdrawn by paragraph (B) of this subsection.

Should the acreages so withdrawn prove insufficient to satisfy a Native Corporation's entitlement, the Secretary is directed, in subsection (a)(3)(A), 43 U.S.C. § 1610(a)(3)(A), to

> . . . withdraw three times the deficiency from the nearest unreserved, vacant and unappropriated public lands. In making this withdrawal the Secretary shall, insofar as possible, withdraw public lands of a character similar to those on which the village is located and in order of their proximity to the center of the Native village . . .

Subsection (a)(3)(B) further conditions that such "deficiency withdrawals" be made "on the basis of the best available information within sixty days of December 18, 1971, or as soon thereafter as practicable."

Section 12(a)(1), 43 U.S.C. & 1611(a)(1) directs Village Corporations to select the withdrawn lands up to the amount of their entitlement. In the event a Village Corporation selects the surface estate to lands located within the National Wildlife Refuge System or Naval Petroleum

Reserve No. 4, the related Regional Corporation is directed to make its comparable subsurface estate selection from other "in lieu" lands withdrawn in § 11(a)(3)(A). Further limitations on Native corporation selections are provided in the balance of § 12 and in § 14, 43 U.S.C. § 1613.

77/ See Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 152-153 (1970); Rowe v. Kleppe, Civ. No. 75-1152 at 9 (D.D.C. July 29, 1976) (Noncompetitive oil and gas lease applicants denied standing to challenge procedural irregularities of Alaska Statehood Act § 10 withdrawals); see also Raypath, Inc. v. City of Anchorage, 544 F.2d 1019, 1021 (9th Cir. 1976) "[T]he validity of a deed or patent from the federal government may not be questioned in a suit brought by a third party against the grantee or patentee".

78/ Hereinafter "ATF".

79/ Defendants' Attachment I, affidavit of Theodore G. Bingham, former Chief, Division of Lands and Realty, Bureau of Land Management, at 2 ["Bingham Affidavit"]. See also, Defendants' Attachment II, affidavit of Gordan Paul Kirton, Office of the Solicitor,

Department of the Interior (legal counsel to the Alaska Task Force), ["Kirton Affidavit"].

80/ See, e.g. ANCSA § 17(d)(1), (2), 43 U.S.C. § 1616(d)(1), (2) (public interest lands, national parks, forest, wildlife refuges, and wild and scenic rivers), ANCSA § 22(e), 43 U.S.C. § 1621(e) (additions to the national wildlife refuge system for lands selected by Natives).

81/ The priority of entitlements was ordered as follows: 1) village deficiencies; 2) ANCSA § 22(e) additions, ANCSA § 17(d)(2) withdrawals and regional deficiencies (to be treated equally); and, 3) ANCSA § 17(d)(1) withdrawals and remaining state selection rights (to be treated equally). Bingham affidavit at 6-7.

82/ P.L.O. 5169 through P.L.O. 5188, 37 Fed. Reg. 5572-5591 (March 16, 1972). The deficiency withdrawals needed for the Regional and Village Corporations of the Arctic Slope region were announced in P.L.O. 5169.

83/ Bingham affidavit at 7-8.

84/ Kirton affidavit at 3.

85/ P.L.O. 5256, 37 Fed.Reg. 18916 (Sept. 16, 1972). These acreages were drawn from lands previously withdrawn under ANCSA § 17(a)(1) (64,448 acres), § 17(d)(2) (736,400 acres) and from previously unreserved lands (414,720 acres). The modifications in ATF's working assumptions are detailed in Mr. Kirton's affidavit in paragraph 7, pp. 4-6.

86/ Id. at 8-9. P.L.O. 5396, 38 Fed.Reg. 26376 (September 20, 1973).

87/ P.L.O. 5428, 39 Fed. Reg. 27666 (July 25, 1974); P.L.O. 5439, 39 Fed.Reg. 38646 (October 25, 1974); P.L.O. 5448, 39 Fed. Reg. 41364 (November 20, 1974); P.L.O. 5455, 39 Fed.Reg. 43549 (December 11, 1974); P.L.O. 5556, 40 Fed. Reg. 58146 (December 12, 1975).

88/ 41 Fed.Reg. 36672 (August 31, 1976); 41 Fed.Reg. 40193 (September 17, 1976).

89/ 43 U.S.C. § 1613(g). The savings clause provides in part:

> All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where prior to patent of any land or minerals under this chapter, a lease, contract,

> permit, right-of-way, or easement . . . has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented . . .

91/ Arctic Slope, supra at 5.

92/ Both groups of Plaintiffs argued in their briefs that they should have received notice of the proposed conveyance to ASRC of the lands they sought to lease. As argued with respect to the denial of a hearing, defendants urge the due process argument accepted

by the District of Columbia Circuit Court of Appeals in Rowe v. Kleppe, supra. Because I find the plaintiffs did have notice, I need not reach this constitutional argument. Plaintiffs received notice as early as March 16, 1972 (37 Fed.Reg. 5572) that the Secretary had withdrawn the lands they sought to lease pending ANCSA selections by ASRC. ASRC's selections were recorded on public records maintained in the Fairbanks office of the BLM. Moreoever, the proposed conveyance was publicized in two Federal Register notices in the fall of 1976. See note 52, supra. Regardless of any legal right of notice, plaintiffs indeed had several opportunities to be informed of the ASRC selection. More on the part of the Department was not required. Plaintiffs' motion on this ground is therefore denied.

93/ See note 24, supra. The same provision was contained in regulations in effect at the time. 43 C.F.R. § 3123.9(c)(3) 1966.

94/ 30 Fed.Reg. 898 ¶3(c) (January 28, 1965); 30 Fed.Reg. 11697 ¶3(c) (September 11, 1965); 31 Fed.Reg. 4741 ¶3(c) (March 19, 1966); 31 Fed.Reg. 12575 ¶3(c) (September 23, 1966).

95/ Plaintiff's exhibits 13, 17 and 20 reveal that even in the first opening the Bureau had intended that advance rentals would not be returnable. Nevertheless, the wording had not adequately conveyed the intent.

96/ Plaintiffs' exhibit 22 reveals that the administrative purpose in the change was solely to remedy the ambiguity and prevent the above described practice. It was also felt that the new language would be fully consistent with its counterparts in the regulations, 43 C.F.R. 3123.9(c)(3), referring both to non-refundability and the requirement of lease execution. See note 98, infra. Memorandum from Ross Youngblood, Manager, Fairbanks District and Land Office, to State Director Burton Silcock, BLM (June 24, 1965). See also plaintiffs' exhibit 24, Memorandum from State Director Burton Silcock to Director, BLM (June 30, 1965). The Secretary also remarked in his Arctic Slope opinion that:

> The change in policy from earlier drawings was designed to prevent the obstructive practice of withdrawal of first drawn offers prior to lease issuance.

Arctic Slope, supra at 6.

97/ Plaintiffs' exhibits Nos. 31-33, when combined with the instructions given to Bureau employees as to procedures to be followed in the openings, indicate that the depositing of advance rentals in the "earned account" was purely an accounting device and was never intended to indicate acceptance of the simultaneous lease offers.

98/ Section 3123.9(c)(3) of the regulations in effect at the time provided in pertinent part:

> Upon determination of the successful drawee for a particular leasing unit, the first year's rental will not be returnable and will be earned and deposited in the United States Treasury upon execution of the lease in behalf of the United States. [Emphasis added].

43 C.F.R. § 3123.9(c)(3).

Section 3123.5 further provided that

> (b) The United States will indicate its acceptance of the lease offer, in whole or in part, and the issuance of the lease by the signature of the appropriate officer thereof in the space provided. [Emphasis added].

43 C.F.R. § 3123.5(b).

> The requirement of execution was absolutely clear from the regulations and was in no way abrogated by the language of the opening notice which merely restated what was evident from the regulations themselves. Other courts have agreed that lease execution is the only manner in which acceptance by the United States of a lease offer may be indicated. See McDade v. Morton, 353 F.Supp. 1006, 1010 (D.D.C. 1973), aff'd per curiam, 161 U.S.App. D.C. 237, 494 F.2d 1156 (1974).

99/ 43 C.F.R. § 3123.9(c)(3).

100/ 43 C.F.R. 3123.5(b). The regulation explicitly states that acceptance and lease issuance occur by the single act of signature. See note 98, supra.

UNITED STATES
DEPARTMENT OF THE
INTERIOR

November 24, 1976

In Re Arctic Slope/Western,
In Re Arctic Slope/Western
(Central)

ANCAB # RLS 76-11(A)-(M)
ANCAB # RLS 76-12(A)-(O)
BLM F-19148 et al.

DECIDED

Appeals from decisions of the Alaska State Office, Bureau of Land Management, to issue conveyances to Alaska Native corporation.

APPEARANCES: Robert L. Hartig, Esq., of Cole, Hartig, Rhodes, Norman and Mahoney, Anchorage, Alaska, for appellants; James Wickwire, Esq., of Wickwire, Lewis, Goldmark, Dystel and Schorr, Seattle, Washington, for appellee Arctic Slope; John W. Burke, Esq., Office of the Regional Solicitor, for appellee Bureau of Land Management, and others.

DECISION BY THE SECRETARY

John T. Rowlett and others have appealed from the decision of the Alaska State Office, Bureau of Land

Management (BLM), dated August 25, 1976, 41 F.R. 36527 (August 30, 1976), to issue conveyance of public lands to appellee Arctic Slope Regional Corporation under the authority of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §1601 et seq. The appeal has been docketed by the Alaska Native Claims Appeal Board (ANCAB) as In Re Arctic Slope/Western, ANCAB # RLS 76-11(A)-(M).

John T. Rowlett and others have appealed from the decision of the Alaska State Office, BLM, dated September 13, 1976, 41 F.R. 40193 (September 17, 1976), to issue conveyance of other public lands to appellee Arctic Slope Regional Corporation under ANCSA. This appeal has been docketed by ANCAB as In Re Arctic Slope/Eastern (Central), ANCAB # RLS 76-12(A)-(O).

By Order issued November 15, 1976, under the authority of 43 CFR 4.5, section 17 of the Mineral Leasing Act of 1920, 30 U.S.C. §226, and 200 Departmental Manual 1.9, I took original jurisdiction over the appeals before ANCAB and the noncompetitive oil and gas lease offers pending in the Alaska State Office, BLM, involved in the appeals before ANCAB.

Appellants in these cases are all the first qualified offerors for noncompetitive oil and gas leases under the provisions of section 17 of the Mineral Leasing Act of 1920, 30 U.S.C. §226.

The lands in question are on the "North Slope" of the Books Range in northern Alaska. During and after World War II, all public lands in northern Alaska were withdrawn from all forms of entry and disposal. Public Land Order (P.L.O.) No. 82, 8 F.R. 1559 (January 23, 1943). As the military demands for the land diminished and the private sector's requests for permission to explore the area for oil and gas increased, P.L.O. No. 82 was revoked and a system for opening the land to leasing under the Mineral Leasing Act established. P.L.O. No. 1621, 23 F.R. 2637 (April 18, 1958), P.L.O. No. 3521, 30 F.R. 271 (January 5, 1965).

These orders opened the land to the filing of non-competitive oil and gas lease offers upon the completion of protraction map-leasing diagrams and opening orders notifying the public that leasing blocks had been established and that offers would be received on those blocks. These opening commenced in January 1965 (Appellants' Ex. 12), beginning with the north-central portion of the North Slope, and continued through the Notice that offers could be filed for land in the Western Arctic involved in these appeals (Appellants' Exhibit No. (Ex.) 1, 31 F.R. 12575 (September 23, 1966)).

The opening orders provided that offers filed before a certain date would be regarded as having been simultaneously filed. When more than one offer was filed for a tract, a drawing was held to establish the first qualified offeror if a lease were to issue. Those tracts for which no offers were filed during the period specified in the opening order then were subject to over-the-counter offer filings. Under this system, public land on the North Slope not otherwise withdrawn was available for the filing on noncompetitive lease offers either 1) by simultaneous filings under an opening order, or 2) by over-the-counter filings.

During this period various Native groups filed protests against lease issuance in the Fairbanks District and Land Office, BLM. In response to the protests, the Department issued a press release November 28, 1966, manifesting its intention to hold the drawing noticed by the opening order of September 23, 1966 (Ex. 1), but not to issue any leases on the first-drawn offers until the Native protests were resolved (Ex. 5). On November 30, 1966, the Department posted a public notice to the same effect (Ex. 6). On December 1, 1966, the Secretary signed a Federal Register notice confirming this policy. 31 F.R. 15496 (December 8, 1966). The drawing at issue in some of the appeals here was held, pursuant to this policy, on December 20, 1966, and no leases have been issued.

Over-the-counter offers continued to be filed for lands on which no offers were received in the drawings. In mid-1968, Atlantic Richfield Co. announced its discovery of oil at Prudhoe Bay on lands leased by the State of Alaska. The announcement generated immense interest; in the next half year over 20,000 noncompetitive oil and gas lease offers were filed in Alaskan BLM office, including offers which covered practically all potentially available land on the North Slope.

The Department responded by issuing protective withdrawals, including P.L.O. No. 4582, 34 F.R. 1025 (1969), which were designed to maintain the public land status pending legislation for the resolution of Alaska Natives' land claims. Subsequently, section 11(a)(1), (a)(2) and (b)(3) of ANCSA, 43 U.S.C. §1610, and Secretarial withdrawals under the authority of section 11(a)(3) of ANCSA, 43 U.S.C. §1610 (a)(3), expressly prevented lease issuance.

In response to the intense interest of the offerors in maintaining their first qualified status in case the lands were not conveyed under ANCSA, the Department did not reject all such pending applications wholesale. Rather it suspended action on them until the land selection rights granted the Natives by ANCSA were exercised, and it could be determined

what land was still public land subject to leasing.

Briefly stated, in their statement of reasons for appeal, they assert the following against the decisions to issue conveyance to appellee Arctic Slope Regional Corporation.

One group of appellants asserts "vested interests" in the lands in question dating from December 20, 1966, under simultaneously-filed, noncompetitive oil and gas lease offers drawn first by the Bureau of Land Management under the opening orders described above and the provisions of 43 C.F.R. Subpart 3123 (1966), now 43 C.F.R. Subpart 3112 (1975). These appellants are listed in Appendix A.

A second group of appellants, including all appellants in Arctic Slope/Central (Eastern), holds "interests" in the lands to be conveyed by virtue of first-filed over-the-counter noncompetitive lease offers. These appellants are listed in Appendix B.

The Secretary's failure to act timely in issuing leases on the offers has prejudiced appellants.

Appellants also assert they are entitled to decisions on their lease offers before subsequent "requests" are considered, and that they are entitled to issuance of executed

leases covering the lands to be conveyed.

Before treating appellants' arguments, I state the law pertaining to noncompetitive oil and gas leasing under section 17 of the Mineral Leasing Act of 1920, 30 U.S.C. §226. Section 17 provides that the Secretary "may" issue noncompetitive oil and gas leases on lands not within any known geological structure of a producing oil or gas field to the first qualified applicant therefor. In Udall v. Tallman, 380 U.S. 1, 4 (1965), the Supreme Court stated, "Although [the Mineral Leasing] Act directed that if a lease was issued on such a tract, it had to be issued to the first qualified applicant, it left the Secretary discretion to refuse to issue any lease at all on a given tract." See also Pease v. Udall, 332 F.2d 62 (9th Cir. 1964); Haley v. Seaton, 281 F.2d 620, 623-26 (D.C. Cir. 1960).

In Schraier v. Hickel, 419 F.2d 663, 667 (D.C. Cir. 1969), the Circuit Court of Appeals applied Tallman and characterized a noncompetitive oil and gas lease offer as a "proposal" which "does not rise to the level of 'claim' or 'right' within the savings clause of the Statehood Act where there has been no such determination to lease." The savings clause of section 6(b) of the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. note preceding §21, makes the State's grant subject to

"any valid existing claim, location, or entry . . . ." This is even more protective of outstanding interests than the savings clause of ANCSA. Section 14(g) of ANCSA, 43 U.S.C. §1613(g), makes all conveyances "subject to valid existing rights." We believe there is no distinction between the Statehood Act and ANCSA relevant in resolving the conflict between either of the statutory grants and pending noncompetitive oil and gas lease offers.

In Arnold v. Morton, 529 F.2d 1101, 1105 (9th Cir. 1976), the Circuit Court of Appeals reaffirmed the conclusion that a noncompetitive oil and gas lease offeror has no right to a lease, and no property interest in his offer. Although the Court in Arnold concluded that the Secretary had erroneously determined that the lands in question were not subject to leasing, the Court rejected the contention that it could order lease issuance.

The Secretary's discretion in noncompetitive oil and gas leasing, and the limited nature of a noncompetitive lease offer, have been confirmed in Burglin v. Morton, 527 F.2d 486 (9th Cir. 1976); Duesing v. Udall, 350 F.2d 748, 750-51 (D.C. Cir. 1965); and Rowe v. Kleppe, Civil No. 75-1152 (D.D.C., July 29, 1976).

No argument made by appellants is persuasive that these cases are distinguishable from those set out above. They are controlling, and the Department will follow them in these cases.

Appellants argue that in the simultaneous drawings in question the offeror became "irrevocably bound when his name was drawn and, reciprocally, the United States accepted the offer at the instant of the drawing." Appellant's brief in In Re Arctic Slope/Western at 18.

This argument has been previously rejected; Schraier v. Hickel, supra, also dealt with offers filed in a simultaneous drawing. The Circuit Court of Appeals stated:

> Nor can it be successfully asserted that the Secretary exercises his discretion whether or not to lease when he gives notice for filing and processing applications . . . . Similarly the Secretary does not lose his ultimate authority because the Departmental officials assumed that appellant would be awarded a lease if he were found to qualify in all respects under pending regulation.

Id. at 667.

Appellants argue that a contract was created in the fact that the offerors' first year's rental would be earned when the offer was first drawn, citing the notice for the drawing in which they were drawn first. All the Notices in question stated that if an offer was rejected, "the advance rental will be returned" to the offeror. E.g., Ex. 13, 30 F.R. 11697 (September 11, 1965); Ex. 16, 31 F.R. 4741 (March 19, 1966). The change in policy from earlier drawings, e.g., Ex. 12, 30 F.R. 898 (January 28, 1965), was designed to prevent the obstructive practice of withdrawal of first-drawn offers prior to lease execution. It was not designed to, nor did it in effect, make the drawing an acceptance of the offer, or constitute a waiver of the Secretary's discretion and a commitment to lease to the first drawn offeror.

The regulation governing noncompetitive lease issuance at the time of the drawings in question, 43 C.F.R. 3123.5(b) (1966), provided, "The United States will indicate its acceptance of the lease offer, in whole or in part, and the issuance of the lease by the signature of the appropriate officer thereof in the space provided." No appellant asserts that the United States executed his offer. The Secretary may not ignore his own regulations. McKay v. Wahlenmaier, 226 F.2d 35, 43 (D.C. Cir. 1955). We reject the argument that a lease contract was

entered into in the drawing. After the drawings in question, the Secretary retained the authority to reject the offers in response to the Native protests and refund the first year's rentals, but did not do so in response to pressure from the lease applicants that they be allowed to retain their priority.

Appellants argue at length that they expected that leases would issue to the successful drawees in these cases as a matter of course after the December 20, 1966, drawing, and that the first notice of the possibility of a suspension was a November 28, 1966, press release. The Department's authority and discretion to lease or not to lease must be judged as of the time of lease execution, rather than the date the offer was filed or drawing notice was posted. E.g., Hannifin v. Morton, 444 F.2d 200 (10th Cir. 1971); Wann v. Ickes, 92 F.2d 215, 217 (D.C. Cir. 1937).

Appellants argue that the Secretary's failure to act on their offers has prejudiced them. Delay alone gives appellants no greater rights than they otherwise had. McDade v. Morton, 353 F.Supp. 1006 (D.D.C. 1973), aff'd, 494 F.2d 1156 (D.C. Cir. 1974). The noncompetitive oil and gas leasing regulations did not compel action on a lease offer within any particular time. 43 C.F.R. 3123.5(b) (1966).

Those appellants who hold over-the-counter lease offers cannot avail themselves of the argument that the provision of the drawing notices regarding first year's rental created a contract. The over-the-counter leasing regulations at that time clearly document that an offer does not become a lease until executed by the appropriate officer, 43 C.F.R. 3123.5(b) (1966), and an offer may be withdrawn without prejudice prior to lease issuance, 43 C.F.R. 2134.5(a) (1966).

Appellants argue that although section 17(a) of the Mineral Leasing Act is permissive, section 17(c) is mandatory and requires lease issuance in these cases. Section 17(a) provides, "All lands subject to disposition under this chapter . . . may be leased by the Secretary." 30 U.S.C. §226(a). Section 17(c) provides, "[T]he person first making application for the lease who is qualified . . . under this chapter shall be entitled to a lease of such lands without competitive bidding." 30 U.S.C. §226(c). Section 17(c) mandates that the Secretary, when he decides to lease, do two things: issue the lease to the first qualified applicant; and (for lands not within any known geological structure of a producing oil or gas field) issue the lease without competitive bidding. Section 17(c) does not restrict his discretion to lease or not to lease; "the Secretary does not

lose his ultimate authority because the Department officials assumed that appellant would be awarded a lease if he were found to qualify . . . ." Schraier v. Hickel, supra at 667.

Next, appellants argue that the "land freeze" policy of the Department between 1966 and 1969 was arbitrary, capricious, and in excess of statutory authority. Appellants argue that lands must be withdrawn from mineral leasing by public land order promulgated under E.O. 10355, 17 F.R. 4831 (1952).

Appellants' supporting argument that E.O. 10355 "has equal application to exercises of discretion by the Secretary under 30 U.S.C. §226" ignores the express language of E.O. 10355, "[a]ll orders issued by the Secretary of the Interior under authority of this order shall be designated as public land orders and shall be submitted . . . for filing and for publication in the federal register." Udall v. Tallman, supra, quoted by appellants on this issue, does not imply or hold that the Secretary's discretion not to lease under 30 U.S.C. §226 can only be exercised by public land order; it is silent on the question. The implication of appellants' argument is that the Secretary must exercise his discretion in favor of leasing unless he withdraws the land under application from mineral leasing by public land order. In our

opinion, the Secretary's discretion not to lease under section 17 of the Mineral Leasing Act may be exercised without formal withdrawal action when the public interest so dictates. The "land feeeze" against which appellants complain was a proper exercise of discretion under section 17.

Appellants argue that the land freeze was arbitrary and capricious because the claims of Indian or aboriginal title did not "divest Congress of its plenary power to dispose of public lands in accordance with duly enacted laws." Appellants' brief in Arctic Slope/Western at 24. Appellants' statement on Congress' authority is correct; under section 17 the Department had the same authority to issue mineral leases after the Native protests were filed as before. The existence of the authority, however, does not mandate lease issuance, as Udall v. Tallman, supra, made clear. The policy decision not to issue leases and to maintain the status of the public lands involved here while the question of Native rights was considered was, to paraphrase Burglin v. Morton, supra at 489, an exercise of discretion, not an abuse of discretion. See Pease v. Udall, supra.

Finally, appellants argue that the Secretary violated his responsibilities as trustee of the public domain in failing to lease to appellants, since (a) the title of the United

States to these lands was never questioned; and (b) issuance of mineral leases could not have adversely affected aboriginal title. As discussed above, the fact that title to the land was not questioned only meant the Secretary had the authority to lease, not that he was required to do so. And while issuance of mineral leases would not jeopardize Native title, the title conveyed if Native rights were granted would have been devoid of what was potentially its most valuable resource. The Department is authorized to administer the public domain; its duties in this regard derive from Congressional exercise of its authority under the Property Clause of the Constitution, not any fiduciary-trust responsibilities. Under its authority the Department has, as in these cases, mediated conflicting demands upon the public domain. The exercise of the discretion granted by statute not to lease in these cases must be examined in light of that time. The "energy crisis" and Project Independence were not then with us. Today's urgency for domestic energy supplies cannot be weighed in judging the decisions of 1966. I reject appellants' argument that the Department violated its duties as administrator of the public domain in the cases at hand.

As the discussion above shows, I conclude that appellants' claim of a property interest in the lands to be conveyed does not withstand scrutiny.

I conclude that appellants have not demonstrated error in the actions complained of. I therefore affirm the decisions of the Alaska State Office to issue conveyances to appellee Arctic Slope Regional Corporation, and dismiss the appeals of John T. Rowlett et al.

I further hereby reject appellants' pending noncompetitive oil and gas lease offers. By this action, the Department seeks to initiate the following policy. It is the policy of the Department of the Interior to expedite conveyances under ANCSA by rejecting pending noncompetitive oil and gas lease offers which conflict in whole or in part with conveyances under ANCSA at the time the lands to be conveyed are definitely identified. This policy is reached upon consideration of the following.

(a) It is the Department's view that section 22(i) of ANCSA, 43 U.S.C. §1621(i), does not authorize the issuance of mineral leases under the Mineral Leasing Act on lands to be conveyed under ANCSA. This section states that the Department's authority to "grant leases" is not to be impaired on lands withdrawn for the protection of Native selection rights. In the statute itself, however, sections 11(a)(1), 11(a)(2), and 16(a) of ANCSA, 43 U.S.C. §§1610(a)(1), (a)(2), and 1615(a), expressly withdraw lands from mineral leasing under the Mineral

Leasing Act. We conclude that Congress did not intend to authorize leasing under the Mineral Leasing Act in section 22(i) of ANCSA, 43 U.S.C. §1621(i). The legislative history of ANCSA corroborates this conclusion. H. RPT. 92-746, 92nd Cong., 1st Sess. (1972) at 45-46. Congress felt that leasing under the Mineral Leasing Act would be inconsistent with the purposes of ANCSA, and did not intend to include the authority to issue leases under the Mineral Leasing Act in section 22(i) of ANCSA. With the decision to issue conveyance, the pending offers come under the rule that an application may not be held pending availability of the land when approval of the application is prevented by a valid selection of record. 43 C.F.R. 2091.1(b).

(b) Even if ANCSA did not preclude lease issuance, this policy would be established in the exercise of the discretion in section 17 of the Mineral Leasing Act, 30 U.S.C. §226. I would not now exercise this discretion by amending the existing withdrawals from mineral leasing in order to lease in these cases. Issuance of leases on the pending offers would frustrate Congressional policy by denying Alaska Native corporations the full benefit of the resources in the lands which Congress intended to be conveyed to them. H. RPT. 92-523, 92nd Cong., 1st Sess. (1971) at 5.

(c) Even if the Department is not barred from issuing mineral leases, issuance of leases on the pending offers at this juncture would nullify the years of policy decision and withdrawals preventing lease issuance in order to protect the rights of Alaska Natives.

(d) The oil and gas lease offerors have been granted protection commensurate with the nature of their interest as first qualified offerors by the Department's suspension of their offers. In light of the discussion of the nature of the offerors' interest above, the Department has safeguarded the offerors' status as first qualified applicants during the intervening years of title uncertainty. The offerors are not due greater deference because the Department suspended, rather than rejected, their applications during the period of the withdrawals in aid of legislation, and after Congress resolved the Native protests by extinguishing aboriginal title and all claims of aboriginal title in ANCSA. The suspension policy has jointly served the interests of the Alaska Natives by allowing the Department to meet fully their rights under ANCSA, and the interests of those first-qualified applicants whose lease offers cover lands not selected. This statement is not intended, however, to imply that the Department will exercise or has exercised its discretion to lease lands not conveyed.

I have exercised jurisdiction over these cases in order to establish this policy and adjudicate the appeals, and in order to resolve the following questions as quickly and fairly as possible.

This action will obviate the delay attendant on exhaustion of the appeal remedies in the Department. In accordance with the policy stated above, oil and gas leases will not be issued as a consequence of administrative appeals; the appeals requesting lease issuance are hereby rejected. In addition, in the cases to which this Order applies, the appellant oil and gas lease offerors assert an interest which is not a "property interest in land." Schraier v. Hickel, supra; Duesing v. Udall, 350 F.2d 748, 750-51 (D.C. Cir. 1965); Rowe v. Kleppe, Civil No. 75-1152 (D.D.C., July 29, 1976). An oil and gas lease offeror thus does not have standing under 43 C.F.R. 4.902 to appeal to ANCAB a BLM decision to issue conveyance. This decision will avoid delay and expense to both the offerors and the Natives in the Department's appeal process, time and expense which the policy stated in this Order renders unnecessary.

This discretion will avoid attempts to invoke the jurisdiction of the Interior Board of Land Appeals by appealing the rejection of the oil and gas lease offers separately from the

appeal of the decision to issue conveyance. The Board of Land Appeals has such appeal authority in the regular oil and gas lease offer case, 43 C.F.C. 4.1(3). Since August 6, 1975, however, appeals in "matters relating to land selection arising under [ANCSA]" lie with ANCAB. 43 C.F.R. 4.1(5), 40 F.R. 33172 (1975). This Order will obviate the confusion and delay of multiple appeals, determinations of jurisdiction under this regulation, and case transfers under 43 C.F.R. 4.901(c).

The Department's administrative remedies afford administrative due process to those who hold or assert property interests. Bypassing these remedies will not violate any procedural due process rights of the offerors. As discussed above, appellant oil and gas lease offerors, whether before ANCAB or IBLA, have no property interest which invokes the hearing requirements of due process, and which would require the application of the Department's hearing regulations, e.g., 43 C.F.R. 4.420-452. Compare Burglin v. Morton, supra at 488, with Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976). In addition, in this case I find no factual dispute which would alter the outcome of the cases, so that the appeals boards' discretionary authority to order hearings in cases containing factual disputes will not be necessary, 43 C.F.R. 4.415, 43 C.F.R. 4.911(c).

Some appellants' offers do not conflict in any part with the conveyances at issue here. Their appeals are dismissed, but their lease offers are not hereby rejected.

This decision constitutes the final action of the Department of the Interior in these cases. The advance rentals which accompanied the applications will be refunded pursuant to the issuance of this decision.

H. Gregory Austin
Acting Secretary of the Interior

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF ALASKA

RICHARD ROWE, et al,	Civil Action
	File No. A76-280
vs.	
UNITED STATES OF AMERICA, et al.	JUDGMENT

This action came on for consideration before the Court, Honorable James M. Fitzgerald, United States District Judge, presideing, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that this action is dismissed with prejudice.

Dated at Anchorage, this 11th day of January, 1979.

Approved by:

James M. Fitzgerald

JoAnn Myres, Clerk of Court/Jan Romack, Deputy Clerk

OFFICE OF THE SECRETARY

ALASKA

Notice of Filing of Protraction Diagrams for Northern Alaska and of Availability of Lands for Noncompetitive Oil and Gas Leasing

Notice is hereby given that the following approved protraction diagrams will be officially filed in the District and Land Office, Bureau of Land Management, Fairbanks, at 10 a.m. on September 26, 1966.

Alaska Protraction Diagrams
(Unsurveyed)
Approved May 17, 1962

Folio No. 6, Sheet No. 7,
Tps. 5-6 N, Rs. 41-45 W

Folio No. 6, Sheet No. 9,
Tps. 1-4 N, Rs. 41-44 W

Folio No. 7, Sheet No. 1,
Tps. 4-8 N, Rs. 49-52 W

Folio No. 7, Sheet No. 2,
Tps. 6-8 S, Rs. 53-55 W

Folio No. 7, Sheet No. 3,
Tps. 6-8 S, Rs. 53-56 W

Folio No. 7, Sheet No. 4,
Tps. 9-12 S, Rs. 61-63 W

Folio No. 7, Sheet No. 5,
Tps. 9-12 S, Rs. 57-60 W

Folio No. 7, Sheet No. 6,
Tps. 9-12 S, Rs. 53-56 W

Folio No. 7, Sheet No. 7,
Tps. 9-12 S, Rs. 49-52 W

Folio No. 8, Sheet No. 3,
Tps. 1-4 S, Rs. 41-44 W

Folio No. 8, Sheet No. 4,
Tps. 1-4 S, Rs. 45-48 W

Folio No. 8, Sheet No. 5,
Tps. 5-8 S, Rs. 45-48 W

Folio No. 8, Sheet No. 6,
Tps. 5-8 S, Rs. 41-44 W

Folio No. 8, Sheet No. 9,
Tps. 9-12 S, Rs. 33-36 W

Folio No. 8, Sheet No. 10,
Tps. 9-12 S, Rs. 37-40 W

Folio No. 8, Sheet No. 11,
Tps. 9-12 S, Rs. 41-44 W

Folio No. 8, Sheet No. 12,
Tps. 9-12 S, Rs. 45-48 W

Folio No. 9, Sheet No. 11,
Tps. 9-12 S, Rs. 25-28 W

Folio No. 9, Sheet No. 12,
Tps. 9-12 S, Rs. 29-32 W

(1) By Public Land Order 3521 of January 9, 1965 (30 F.R. 271), the lands in the above described townships and ranges were opened to oil and gas leasing subject to the filing of approved leasing maps.

(2) The foregoing protraction idagrams, additionally labeled "Official Leasing Map-PLO 3521" and "Revised September 12, 1966, to show leasing blocks" are hereby approved and will be officially filed simultaneously with the protraction diagrams. They constitute the approved leasing maps required by Public Land Order 3521. Only those lands delineated and described as leasing blocks on the official leasing maps are made available for leasing offers by this notice.

(3) On the date the approved leasing maps are officially filed in the Fairbanks District and Land Office, the lands described therein will become available for noncompetitive oil and gas leasing pursuant to the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. sec. 181, et seq.) as amended, the regulations in 43 CFR Part 3120, and the provisions of this notice. The provisions of this notice shall supersede any provisions of the regulations with which they may be in conflict.

(a) In accordance with section 1 of Public Land Order 3521, all offers to lease the above described lands must describe the land applied for by block numbers in the specified townships as shown on the approved leasing maps. Each leasing block will be deemed to be a legal subdivision, subject to the restriction on assignments of part of a legal subdivision as set forth in 43 CFR 3128.8.

(b) Offers to lease these lands in the manner set out in paragraph (c) may be filed in the Fairbanks District and Land Office of the Bureau of Land Management from 10 a.m. on September 26, 1966, until 4 p.m. on November 18, 1966. Such offers will be considered as having been simultaneously filed.

(c) Offers to lease must be submitted on a "Special Oil and Gas Drawing Entry Card," Form 4-1720, signed by the applicant. The card will constitute the applicant's offer to lease the described block of land by participating in the drawing to determine the successful drawee. By signing and submitting the entry card, the applicant agrees that he will be bound to a lease on Form 4-1158 for the described block if such a lease is issued to him as a result of the drawing. Provisions of 43 CFR 2123.3 (a) concerning multiple filings for one tract apply to this opening. Only one entry card will be drawn for each

leasing block. The entry card must be accompanied by a $10 filing fee and the first year's advance rental for the total area as shown on the appropriate approved leasing map. The advance rental must be paid by cash, money order, certified check, bank draft, or bank cashier's check. While filing fees for two or more offers may be combined in one check, money order, etc., the advance rental must be submitted separately with each offer. The "Special Oil and Gas Drawing Entry Card" may be obtained from the land offices of the Bureau of Land Management in Fairbanks and Anchorage, Alaska, from the Denver Service Center, Building 50, Denver Federal Center, Denver, Colo. 80225, or from the Office of the Director of the Bureau of Land Management, Washington, D.C. 20240.

(d) Upon the determination of the successful drawee for a particular block, the first year's rental will be earned and deposited in the U. S. Treasury, and will not be returnable. However, if an offeror withdraws his offer to lease prior to the beginning of the drawing or if his offer is rejected, the advance rental will be returned to him. Offerors who are unsuccessful in the drawing will be notified by the return of their respective entry cards.

(e) Any lands not included in offers to lease filed during the

simultaneous filing period, or in offers which are withdrawn before the drawing, will become subject to leasing, as of 1 a.m. on November 21, 1966, in the usual manner on a priority of filing time basis and in accordance with the regulations in 43 CFR Part 3120, except that such offers must describe the lands by the leasing blocks as shown on the approved leasing maps.

(f) If a successful drawee is unqualified to receive a lease, the lands in the leasing block shall be included in a special simultaneous filing procedure to be announced at a later date by the Manager, Fairbanks District and Land Office.

(g) The provisions of 43 CFR 3120.6 pertaining to settlers on unsurveyed lands are not applicable to offers filed under the provisions of this notice.

(h) The drawing entry cards of unsuccessful applicants will be made available for public inspection pursuant to the provisions of 43 CFR Part 2, 60 days after the drawing is completed.

(4) Copies of the protraction diagrams listed herein and the approved leasing maps may be purchased at $1 per sheet from the Fairbanks District and Land Office, Bureau of Land Management, 516 Second Avenue,

Fairbanks, Alaska 99701. Copies will not be available at the Bureau's Wahington Office.

Stanley A. Cain,
Assistant Secretary
of the Interior.

September 20, 1966

[F.R. Doc. 66-10446;
Filed, Sept. 22, 1966, 8:48 a.m.]

No. 80-1480

APR 1
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IN THE

Supreme Court of the United States

October Term, 1980

RICHARD ROWE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

ARCTIC SLOPE REGIONAL CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

Kevin F. Kelly
WICKWIRE, LEWIS, GOLDMARK & SCHORR
Attorneys for Respondent Arctic Slope Regional Corporation

Office and Post Office Address:
500 Maynard Building
Seattle, Washington 98104
Telephone: (206) 622-9603

CRAFTSMAN PRESS — SEATTLE, WASHINGTON

QUESTION PRESENTED

Did the Secretary of the Interior become contractually bound to execute oil and gas leases to petitioners merely by drawing their lease offers, which were accompanied by a required deposit of one year's rent, at a simultaneous drawing conducted pursuant to the Mineral Leasing Act, although (1) neither the Secretary nor any other government official ever signed any lease or contract for a lease with petitioners, (2) the Secretary gave notice before and at the time of the lease offer drawing that the drawing itself would not necessarily lead to the issuance of leases, and (3) the Secretary returned petitioners' advance rentals to them when he rejected their offers?[i]

(i) In addition to the parties of record, the following companies have an interest in the outcome of the case:

Amoco Production Company
Chevron U.S.A., Inc.
Getty Oil Corporation
Mobil Oil Company
Shell Oil Company
Union Oil Company of California

These companies have interests in oil and gas leases from respondent Arctic Slope Regional Corporation on certain lands to which petitioners' claims relate.

TABLE OF CONTENTS

	Page
Opinions Below	1
Question Presented	1
Statement of the Case	2
A. Factual Background	2
B. Proceedings In the Courts Below	8
Summary of Argument	10
Argument	12
I. The Courts Below Correctly Decided the Case	12
A. The Lower Courts Applied Well-Established Legal Principles in Finding That the Lease Offer Drawing Did Not Restrict the Secretary's Discretion Later to Reject All Lease Applications	12
B. The Lower Courts Correctly Rejected Petitioners' Attempt to Claim That Their Case Is An Exception to These Established Rules	14
II. In Any Event, This Case Does Not Warrant Review By This Court	18
A. There Is No Conflict Among the Circuits	18
B. There Is No Other Reason That Warrants Review by This Court	20
Conclusion	21

TABLES OF AUTHORITY

Table of Cases

Arnold v. Morton, 529 F.2d 1101 (9th Cir. 1976) 12, 13, 15, 20

Burglin v. Morton, 527 F.2d 486 (9th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976) 12, 13, 20

Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966) 12, 13, 15

Haley v. Seaton, 281 F.2d 620 (D.C. Cir. 1960) 12, 13

McDade v. Morton, 353 F. Supp. 1006 (D.D.C. 1973), *aff'd*, 494 F.2d 1156 (D.C. Cir. 1974) 12, 17, 20

McTiernan v. Franklin, 508 F.2d 885 (10th Cir. 1975) .. 12

Page

Pease v. Udall, 332 F.2d 62 (9th Cir. 1964) 12

Rowe v. Kleppe,
Civ. No. 75-1152 (D.D.C. July 30, 1976) 12

Rowe v. United States,
464 F. Supp. 1060 (D. Alas. 1979) 12, 13, 17

Schraier v. Hickel,
419 F.2d 663 (D.C. Cir. 1969) 13, 14, 15, 20

Superior Oil Co. v. Udall,
409 F.2d 1115 (D.C. Cir. 1969) 17, 18, 19, 20

Udall v. Tallman, 380 U.S. 1 (1965) 12, 13, 14

United States ex rel. McLennan v. Wilbur,
283 U.S. 414 (1930) 12

Statutes

30 U.S.C. § 226(c), Mineral Leasing Act of 1970
§ 17(c) 12

30 U.S.C. § 226-2 20

43 U.S.C. §§ 1601-27, Alaska Native Claims Settlement
Act 2, 7

43 U.S.C. § 1610(a)(1) 7

43 U.S.C. § 1610(a)(3) 7

Textbooks

Restatement (Second) of Contracts § 24A (Tent. Drafts
Nos. 1-7 (1973) 16

Other Authority

43 C.F.R. § 3123.5(b) (1966) 3, 4, 17

31 Fed. Reg. 12575 (Sept. 23, 1966) 4

31 Fed. Reg. 15494 (Dec. 8, 1966) 6

34 Fed. Reg. 1025 (Jan 22, 1969) 7

37 Fed. Reg. 5572 (March 16, 1972) 7

37 Fed. Reg. 18916 (Sept. 16, 1972) 7-8

38 Fed. Reg. 26376 (Sept. 20, 1973) 8

41 Fed. Reg. 36672 (Aug. 31, 1976) 8

41 Fed. Reg. 4193 (Sept. 17, 1976) 8

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BRIEF FOR RESPONDENT

ARCTIC SLOPE REGIONAL CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 633 F.2d 799 (9th Cir. 1980).[1] The opinion of the district court (Pet. App. A-12 to A-76) is reported at 464 F. Supp. 1060 (D. Alas. 1979).

QUESTION PRESENTED

Did the Secretary of the Interior become contractually bound to execute oil and gas leases to petitioners merely

1. The first paragraph of what purports to be the Ninth Circuit's opinion in Petitioners' Appendix (Pet. App. A-1) is a typographical error and has nothing to do with this case. The Ninth Circuit's opinion begins on A-2 of Petitioners' Appendix.

by drawing their lease offers, which were accompanied by a required deposit of one year's rent, at a simultaneous drawing conducted pursuant to the Mineral Leasing Act, although (1) neither the Secretary nor any other government official ever signed any lease or contract for a lease with petitioners, (2) the Secretary gave notice before and at the time of the lease offer drawing that the drawing itself would not necessarily lead to the issuance of leases, and (3) the Secretary returned petitioners' advance rentals to them when he rejected their offers?[2]

STATEMENT OF THE CASE

A. Factual Background

Respondent Arctic Slope Regional Corporation ("ASRC"), a Native corporation created pursuant to express provisions of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-27, holds legal title to land on which petitioners seek federal oil and gas leases. Petitioners filed their lease applications in 1966, when the land was still in federal ownership. In 1976, pursuant to the terms of ANCSA, the Secretary of the Interior rejected their lease applications and conveyed title to the land, including subsurface rights, to ASRC.

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2. In addition to the parties of record, the following companies have an interest in the outcome of the case:

Amoco Production Company
Chevron U.S.A., Inc.
Getty Oil Corporation
Mobil Oil Company
Shell Oil Company
Union Oil Company of California

These companies have interests in oil and gas leases from respondent Arctic Slope Regional Corporation on certain lands to which petitioners' claims relate.

Petitioners here seek a court order compelling the Secretary to issue oil and gas leases on ASRC's land. (Pet. 4.) Petitioners are also, at this time, pursuing a claim for damages for breach of contract against the United States in the Court of Claims.

The factual background relevant to this case is as follows:

Two procedures exist for the noncompetitive leasing of federal lands under the Mineral Leasing Act. Under the first, called "simultaneous filing," lease applicants file offers pursuant to a notice from the Secretary that lands are available for leasing. All offers filed by a specified date are deemed to be simultaneously filed. The Secretary then holds a drawing to determine which lease offeror will become the first-qualified applicant or offeror for a particular lease *if* the Secretary later decides, in his discretion, to issue leases for the land involved. This procedure thus avoids a "race to the counter" to determine priorities among lease applicants. Petitioners' applications were of this type.

The second noncompetitive leasing procedure, followed by petitioners' co-plaintiffs in the district court, simply involves the filing of "over-the-counter" lease offers in the designated office of the Bureau of Land Management. This method does involve a "race to the counter," and the first-qualified applicant to file an offer has priority for a lease as against other lease applicants if the Secretary decides to issue a lease.

Both procedures are governed, and were governed at the time relevant to this case, by a regulation of the Department of the Interior that specifies how the United States indicates its acceptance of a lease offer and the issuance of a lease. 43 C.F.R. § 3123.5(b) (1966) provided:

> The United States will indicate its acceptance of the lease offer, in whole or in part, and the issuance of the lease *by the signature of the appropriate officer thereof in the space provided.*

(Emphasis added.)

Petitioners filed their lease applications in 1966 following a notice published by the Secretary inviting lease applications for specified lands on Alaska's North Slope. 31 Fed. Reg. 12575 (Sept. 23, 1966). That notice provided that the Secretary would treat lease offers filed on or before November 18, 1966, as "simultaneous" filings. The notice required applicants to submit their offers on a special form and to include a $10 filing fee *and* the first year's advance rental as part of their offer. According to the notice, this advance rental was returnable if an applicant withdrew his offer prior to the date of the drawing, which was to be December 20, 1966, or if the Secretary rejected offers during or after the drawing. If an applicant became a "successful drawee" for a particular block of land, however, the applicant became bound to enter into a lease "if such a lease [were] issued to him as a result of the drawing." *See* 464 F. Supp. at 1065 n.24 (Pet. App. A-53).

The applicant's contingent obligation and the requirement of an advance deposit were special provisions developed by the Secretary to alleviate problems caused by lease applicant-speculators who had been abusing prior leasing procedures. As the district court explained:

> The Secretary's purpose in changing the last three opening notices in respect to the non-returnability of the first-year's rental was solely to prevent an obstructive practice of certain applicants who would withdraw their first-drawn offers, after the drawing but prior to lease issuance, if they were unsuccessful in bartering their lease priority. Under prior practice

> speculators could file offers on numerous blocks of land, tendering the nominal $10.00 filing fee per offer. If any of the offers became "first-drawn" offers following the drawing, the speculators would seek to sell those offers to a third party, for a profit. If a lease could not ultimately be sold, the first-drawn offer was withdrawn before any leases were executed. The non-withdrawal provision for advance payment of the first-year's rental was a remedial measure designed to discourage such speculation (and the resulting obstructive effect on the Bureau office) and to require offerors, as defendants so aptly state, to "cover their bets."

464 F. Supp. at 1078 (Pet. App. A-44 to A-45).

The Secretary, on the other hand, was obligated to lease only to "successful drawees" *if* the Secretary later decided to lease to anyone.

On November 28, 1966, in response to considerable pressure from Alaska Native groups protesting the potential leasing of lands to which they asserted claims of aboriginal title, the Anchorage office of the Bureau of Land Management issued a press release stating that "[t]he Department of Interior, Bureau of Land Management will hold the North Slope oil and gas lease drawing on December 20, 1966, but will not issue any leases resulting from the drawing." The press release stated that the drawing "will be held to determine *priorities*," but that "no final action will be taken on any applications" until Native protests were resolved. (Emphasis added.) *See* 464 F. Supp. at 1067 (Pet. App. A-19 to A-20).

On November 30, 1966, the Anchorage Land Office posted a public notice confirming that the Secretary had issued instructions to hold the lease offer drawing as scheduled on December 20, 1966, "to determine successful *drawees* among the *offerors*, but to postpone issuance of the

leases until the question of the aboriginal claim is further considered." 464 F. Supp. 1067 (Pet. App. A-20) (emphasis added). That notice concluded with the following paragraph:

> Upon determination of the successful drawee for each leasing block the first year's rental will not be returnable, *unless the offer is rejected.* At this time there is no estimate as to *when* or *if* the leases will be issued.

464 F. Supp. at 1067 (Pet. App. A-20) (emphasis added). On November 30, 1966, a similar notice was posted in the Department's Fairbanks Land Office and published the next day in the local newspaper. 464 F. Supp. at 1067 (Pet. App. A-21). On December 1, 1966, the Secretary filed a similar public notice with the Office of the Federal Register announcing the suspension of any lease issuance pending the consideration of the Native protests, but stating that "drawings will proceed as indicated in the notice published September 23, 1966." 31 Fed. Reg. 15494 (Dec. 8, 1966), 464 F. Supp. at 1067 (Pet. App. A-21). Finally, the federal officials who conducted the drawing on December 20 made a similar announcement orally before the drawing began.

Thus, on several occasions prior to the lease offer drawing, the Secretary put petitioners on notice that although the drawing would be conducted, it would not necessarily lead to the issuance of leases. Applicants were free at any time prior to the drawing to withdraw their offers and obtain the return of their advance rentals. Hundreds of lease offerors withdrew their offers and recovered their advance rentals. *See* 464 F. Supp. at 1067 and n. 40 (Pet. App. A-21 to A-22). Hundreds more left their offers on file, however, gambling that the Native protests would be resolved in

such a way that the Secretary still might issue leases to them in the future. Petitioners left their offers on file.

On December 20, 1966, the Department of the Interior held the lease offer drawing as scheduled, and petitioners claim to be among those whose offers were drawn. No lease was ever executed as a result of that drawing.

During this same period of time, sentiment was rising in Alaska and in Congress for resolution of long-standing controversies surrounding Native land claims in Alaska. In late 1966 the Secretary suspended the issuance of mineral leases in Alaska until Congress resolved the controversy. On January 17, 1969, the Secretary issued P.L.O. 4582 (34 Fed. Reg. 1025, Jan. 22, 1969), which formally withdrew all public lands in Alaska from mineral leasing "for the determination and protection of the rights of the Native Aleuts, Eskimos and Indians of Alaska."

After years of intense consideration of this complex issue, Congress, on December 18, 1971, enacted the Alaska Native Claims Settlement Act ("ANCSA"), codified at 43 U.S.C. §§ 1601-27. ANCSA guaranteed Alaska's Natives the right to select 40 million acres of land, including both surface and subsurface rights, and set forth a complicated formula for determining public lands subject to Native selection rights. 43 U.S.C. § 1610(a)(1) and (a)(3).

The Act explicitly authorized the withdrawal of land for selections by respondent Arctic Slope Regional Corporation, thereby insulating that land from all forms of appropriation under the public land laws. The Secretary formally withdrew the necessary land for ASRC's selections by issuing P.L.O. 5169 (37 Fed. Reg. 5572, March 16, 1972), which order was modified by P.L.O. 5256 (37 Fed. Reg.

18916, Sept. 16, 1972) and P.L.O. 5396 (38 Fed. Reg. 26376, Sept. 20, 1973). Thereafter, ASRC selected the land to which it was entitled from those withdrawals, and, on August 31 and September 17, 1976, the Bureau of Land Management published decisions approving the conveyance of those selected lands to ASRC, as required by ANCSA. *See* 41 Fed. Reg. 36672 (Aug. 31, 1976) and 41 Fed. Reg. 4193 (Sept. 17, 1976).

Petitioners filed administrative appeals before the Alaska Native Claims Appeal Board ("ANCAB") challenging the Department's proposed conveyances to ASRC and demanding that the Department issue leases to them. In a lengthy decision dated November 24, 1976, the Secretary dismissed petitioners' appeals and rejected petitioners' lease applications. *In re Arctic Slope/Western*, ANCAB No. RLS 76-11(A)-(MM) and *In re Arctic Slope/Eastern (Central)*, ANCAB No. RLS 76-12(A)-(O), (Pet. App. A-77 to A-97). As required, the Secretary then tendered all of petitioners' advance rentals to them. (Pet. 10).

On November 29, 1976, the United States conveyed legal title of the lands in question to ASRC. This lawsuit followed.

B. Proceedings in the Courts Below

Petitioners, and a companion group of plaintiffs (the *Rowlett* plaintiffs) whose case was consolidated with petitioners' case in the district court, raised numerous claims in that court. They claimed that their lease applications gave them a "priority right" over the Arctic Slope Regional Corporation to the lands in question, and that their applications constituted "valid existing rights" to which the conveyances to ASRC were subject. They raised several claims

challenging the manner in which the Secretary considered and rejected their applications and the factors that influenced his decision. They also challenged the manner in which the Secretary determined the lands that ASRC was eligible to select under ANCSA. Finally, petitioners claimed that they had a contractual right to leases from the Secretary based solely on the fact that their lease offers were drawn from among other lease offers simultaneously filed on December 20, 1966.

In an exhaustive opinion on the legal status of applicants for noncompetitive federal oil and gas leases, the district court considered and rejected each of petitioners' claims. 464 F. Supp. 1060. The district court held, *inter alia*, that petitioners had no legal claims, by contract or otherwise, as a result of their lease applications, and that their deposit of advance rentals did not alter that fact. The district court reviewed all of the public notices related to this lease offering and found "nothing in any of the notices or the regulations, to support plaintiffs' reading." 464 F. Supp. at 1079 (Pet. App. A-46 to A-47). The court concluded that the United States could not indicate its acceptance of petitioners' lease offers in any manner other than by the signature of the appropriate officer on the lease form, which acceptance never occurred. 464 F. Supp. at 1079 (Pet. App. A-47). The district court also upheld in all respects the manner in which the Secretary processed petitioners' lease applications.

On appeal to the Ninth Circuit, petitioners abandoned all of their many claims except the claim that the simultaneous drawing had given them a contract right to issuance of a lease. Their companion plaintiffs chose not to

appeal at all. The Ninth Circuit affirmed the district court on the merits:

> Turning to the merits, we agree with the district court that the plaintiffs failed to establish any right to the leases they sought, by contract, statute, or otherwise. We affirm the grant of summary judgment for the defendants on this issue for the reasons stated in the district court's opinion.

633 F.2d at 802-03 (Pet. App. A-9).

The Ninth Circuit concluded, however, that the district court lacked jurisdiction even to entertain petitioners' claim for breach of contract damages against the United States because the Court of Claims had exclusive jurisdiction over that claim. On that issue alone, therefore, the Ninth Circuit reversed and remanded the case with directions that the district court either dismiss petitioners' damage claim for lack of jurisdiction or, in its discretion, transfer that claim to the Court of Claims. 633 F.2d at 802 (Pet. App. A-8).

On February 27, 1981, having already petitioned this Court for a writ of certiorari to the Ninth Circuit, petitioners moved the district court for an order transferring their damage claim to the Court of Claims.

The sole issue petitioners raise in their petition relates to their claim that they are contractually entitled to the issuance of oil and gas leases by the Secretary.

SUMMARY OF ARGUMENT

The principal issue in this case is not, as petitioners suggest, whether the United States Government can "accept as earned, and then spend and refuse to return, advance rentals tendered for oil and gas leases on public lands, yet have no obligation to issue those leases." (Pet. i.) Rather,

the issue is whether the Secretary of the Interior became contractually obligated to execute oil and gas leases to petitioners merely by drawing their lease offers at a simultaneous lease offer drawing, when the Secretary gave notice that a special deposit would be required that would be held until the Secretary determined whether to issue leases, where neither the Secretary nor any other government official ever signed any lease or contract for a lease with petitioners, and where the Secretary refunded petitioners' deposit after determining that no lease whatsoever would be issued to any person as a result of the lease drawing.

The courts below, applying principles of law well established in this Court and the United States Courts of Appeals for the Ninth Circuit, the District of Columbia Circuit and other circuits, correctly decided that the petitioners failed to establish any right to the leases they seek, by contract, statute or otherwise. The three well-established principles of law that compelled this conclusion are: (1) the Secretary has broad discretion in the area of mineral leasing and can refuse to issue any lease at all on a given tract; (2) a mere application for a lease vests no rights in the applicant; and (3) the Secretary's construction of his own administrative regulations relating to the issuance of mineral leases is entitled to great deference. Further, as the courts explicitly found, the regulations governing the lease drawings made clear that petitioners would not receive any contractual right to issuance of a lease unless and until the appropriate government official signed the appropriate lease form, which never occurred here.

In any event, the issue in this case, which depends upon the application of the specific and unique facts of this case to undisputed, well-established principles of law and

which involves no conflicts among the circuits, does not warrant review by this Court.

ARGUMENT

I. The Courts Below Correctly Decided The Case.

A. *The Lower Courts Applied Well-Established Legal Principles in Finding That the Lease Offer Drawing Did Not Restrict the Secretary's Discretion Later to Reject All Lease Applications.*

Three principles of law well-established in this Court and the courts of appeals and district courts coalesced in this case to compel the result reached by the lower courts.

First, it is well established that the Secretary has broad discretion in the area of mineral leasing, including the discretion to refuse to issue any leases at all. Although Section 17(c) of the Mineral Leasing Act of 1920, 30 U.S.C. § 226(c), required the Secretary to issue leases to the first qualified applicants *if* the Secretary decided to issue any leases at all, the Act "left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 380 U.S. 1, 4 (1965). "It is quite evident that the Secretary has no obligation to issue any lease on public lands." *Arnold v. Morton*, 529 F.2d 1101, 1105 (9th Cir. 1976).[3]

3. *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 418-19 (1930); *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976); *Arnold v. Morton*, 529 F.2d 1101, 1105, (9th Cir. 1976); *McTiernan v. Franklin*, 508 F.2d 885, 887 (10th Cir. 1975); *Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966); *Pease v. Udall*, 332 F.2d 62, 63 (9th Cir. 1964); *Haley v. Seaton*, 281 F.2d 620, 623-24 (D.C. Cir. 1960); *Rowe v. United States*, 464 F. Supp. 1060, 1070 (D. Alas. 1979); *Rowe v. Kleppe*, Civ. No. 75-1152 at 4-5 (D.D.C. July 30, 1976); *McDade v. Morton*, 353 F. Supp. 1006, 1010 (D.D.C. 1973), *aff'd*, 494 F.2d 1156 (D.C. Cir. 1974).

The second and related established principle of law governing this case is that "[a] mere application for a lease vests no rights in the applicant." *Arnold v. Morton*, 529 F.2d 1101, 1106 (9th Cir. 1976). The drawing of an offer from among others simultaneously filed only serves to establish priorities *among competing lease applicants*, and in no way reduces the discretion of the Secretary to refuse to issue any lease at all.[4]

Petitioners' attempt to concoct a conflict between the Ninth Circuit and the District of Columbia Circuit is misguided. Those circuits have consistently applied the same rule on this issue:

> [E]ven where an application for a lease is both first in time and filed in response to a government notice that it will receive offers, no legal claim against the Government arises.

Arnold v. Morton, 529 F.2d 1101, 1106 (9th Cir. 1976), *and cases cited therein.*

> The filing of an application which has not been accepted does not give any right to a lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved.

Duesing v. Udall, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966).

Indeed, the opinion of the Court of Appeals for the District of Columbia Circuit in *Schraier v. Hickel*, 419 F.2d 663 (D.C. Cir. 1969), upon which the district court in

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4. *Burglin v. Morton*, 527 F.2d 486, 488 n.2 (9th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976); *Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966); *Schraier v. Hickel*, 419 F.2d 663, 666 (D.C. Cir. 1969); *Haley v. Seaton*, 281 F.2d 620, 623-24 (D.C. Cir. 1960); *Rowe v. United States*, 464 F. Supp. 1060, 1070 (D. Alas. 1979); *see Udall v. Tallman*, 380 U.S. 1, 4 (1965).

this case relied and which is cited with approval in numerous opinions of the Ninth Circuit, the District of Columbia Circuit and other circuits, puts petitioners' status clearly in perspective.

> The fact that the Bureau published a notice that it would receive offers to lease did not preclude a later exercise of discretion to decline to lease. *An application for a lease,* even though first in time or *drawn by lot from among simultaneous offers, is a hope, or perhaps expectation, rather than a claim.*

419 F.2d at 666. Like the unsuccessful plaintiffs in *Schraier v. Hickel,* the petitioners here have only hopes, or perhaps expectations, but no bona fide claims.

The third well-established principle of law applicable here is that when the construction of an administrative regulation is at issue, the interpretation given that regulation by the officers or agency charged with its administration must be shown great deference. *Udall v. Tallman,* 380 U.S. 1, 16 (1965), *and cases cited therein.* Here, the Secretary interpreted departmental regulations as providing that a decision to issue a lease and the issuance of a lease could be effected only by the signature of an appropriate government official on the appropriate form. No such signature occurred here.

B. *The Lower Courts Correctly Rejected Petitioners' Attempt to Claim That Their Case Is An Exception to These Established Rules.*

Petitioners attempt to circumvent these well-established principles of law by arguing that the Secretary must have become bound to issue leases to them at the same time that petitioners became bound to pay their first year's rent: at the time of the drawing on December 20, 1966. (Pet. 17.) This contention is without factual or legal foundation. As

discussed above, the fact that petitioners' lease applications may have been drawn from among others deemed simultaneously filed on December 20, 1966, in no way vested petitioners with any legal claim against the Secretary and did not diminish or restrict the discretion vested in the Secretary to refuse to issue any leases at all. *Arnold v. Morton*, 529 F.2d 1101, 1106 (9th Cir. 1976), *and cases cited therein; Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966); *Schraier v. Hickel*, 419 F.2d 663, 666 (D.C. Cir. 1969).

Similarly, the fact that the Secretary required lease applicants to deposit the first year's rental in advance as part of their application procedure did not in any way restrict or reduce the Secretary's discretion later to refuse to issue a lease to the lease applicants. As discussed above and in the district court's opinion, the Secretary's purpose in requiring an advance rental deposit was to discourage speculation that was having an obstructive effect on the Department's administration of the leasing program. 464 F. Supp. at 1078 (Pet. App. A-44 to A-45.) The requirement that the first year's rentals were not returnable unless and until the Secretary rejected the lease applications in no way altered the established policy and requirements of law that lease acceptance remained in the full discretion of the Secretary up until the time that the Secretary exercised the discretion to issue leases and a designated government official formally executed leases in favor of selected applicants. As the district court explained:

> The non-returnability of the first-year's rental had been announced in the September, 1966 opening notice as one of the filing requirements necessary for an offer to be eligible for the drawing. Plaintiffs argue that while not explicitly stated in the notice, this pro-

vision for non-returnability indicated that the Department agreed to be bound to issuance of leases to successful drawees. I disagree.

The opening notice published in the Federal Register made it abundantly clear that the filing of an application constituted an "offer to lease," and that the applicant agreed he would be bound to a lease "if such a lease is issued to him as a result of the drawing." Nowhere in the notice is there mention that the non-returnability provision altered the Secretary's traditional discretion over whether or not to lease.

. . . .

The documents uniformly reveal a singular Bureau intent in the notices to provide for a non-returnability policy that would be consistent with the regulations in existence at the time; particular accounting procedures were never intended to add more to this limited goal. There is no support anywhere for plaintiffs' theory that paragraph 3(d) of the notice was somehow also intended to alter the established policy and requirements of law that lease acceptance remain within the full discretion of the Secretary up until a designated government official had executed leases in favor of priority-holding applicants.

464 F. Supp. at 1078-79 (Pet. App. A-43 to A-45).[5]

5. While the district court correctly found it "unnecessary to pigeonhole the leasing procedure here employed into a recognized form of contract," the court properly found the procedure employed in this lease offering analogous to an option contract or an irrevocable offer. 464 F. Supp. at 1080 n. 102 (inadvertently omitted from Petitioners' Appendix). When petitioners chose to make lease offers, they did so on the basis of conditions set forth in the Secretary's September opening notice. Those conditions included the payment of a $10 filing fee, deposit of the first year's advance rental, and a promise that each offer would be irrevocable after the December 20 drawing. In exchange for these deposits and a promise of irrevocability, the Secretary promised to issue a lease to the offerors whose names were drawn on December 20 *if* he decided to lease to anyone. The legal relationship between the Secretary and successful drawees was a valid option contract (or an irrevocable offer) in the classic sense. *See* Restatement (Second) of Contracts § 24A (Tent. Drafts Nos. 1-7, 1973), and accompanying comments and illustrations. While the Secretary had the option to lease or not to lease, his promise to lease to successful drawees *if* he issued any

A departmental regulation in force at the time of this lease offer drawing, 43 C.F.R. Section 3123.5(b), expressly provided that the United States would indicate its acceptance of a lease offer by the exclusive method of the appropriate government official's signature on the lease form. "No other manner has been provided, or recognized by any court, for the United States to indicate its acceptance of an oil or gas lease offer." *McDade v. Morton*, 353 F. Supp. 1006, 1010 (D.D.C. 1973), *affirmed*, 494 F.2d 1156 (D.C. Cir. 1974); *Rowe v. United States*, *supra*, 464 F. Supp. at 1079 n. 98. The petitioners had abundant notice that, despite their deposit of an advance rental, the mere drawing of their lease offers at the December 20 drawing would not itself constitute the Secretary's acceptance of those lease offers, and that implementation of this regulation would be the only method by which the Secretary would indicate his acceptance of the lease offers.

Moreover, the Secretary interpreted the applicable regulations in this fashion. The lower courts properly gave great deference to the Secretary's interpretation of his own regulations. As the district court stated:

> Under the two leading cases of the Supreme Court discussed earlier [citations omitted], I am required to uphold the decision of the Secretary if I find that its reasoning and its interpretation of its own regulations contain the "power to persuade." Indeed, I find that the Secretary's decision interpreting paragraph (c) of

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leases at all was sufficient consideration to bind petitioners to their irrevocable offer. *Id.* § 2, Comment e, Illustration 3; *id.* § 78, Comment d, Illustration 8.

In any event, even if this procedure did conflict with common law contract principles, which it did not, the statutory and regulatory requirements of the Mineral Leasing Act would prevail over general contract principles. *Superior Oil Co. v. Udall*, 409 F.2d 1115, 1121 (D.C. Cir. 1969).

> the September notice as a narrow provision designed solely to reduce lease brokering is a reasonable, if not the only interpretation consistent with the Department's prior procedure in oil and gas leasing programs. I further find that the statutory mandate of the Mineral Act is not impeded, and indeed is buttressed by the retention of discretion to lease until the moment at which leasing occurs through execution. The Secretary's decision regarding the manner of acceptance is therefore affirmed.

464 F. Supp. at 1080 (the last page of the district court's opinion was omitted, apparently inadvertently, from Petitioners' Appendix).

In sum, the lower courts correctly applied three well-established and undisputed principles of law to the specific facts of this case. The Secretary rejected petitioners' lease applications and returned their advance rentals. The lower courts properly concluded that petitioners' claims against respondents are without merit.

II. In Any Event, This Case Does Not Warrant Review By This Court.

A. *There Is No Conflict Among the Circuits.*

There is not, as petitioners contend, any conflict between the positions of the Courts of Appeals for the Ninth Circuit and the District of Columbia Circuit on the Secretary's acceptance of oil and gas lease offers. *See* Part I(A), *supra.* Petitioners' reliance upon *Superior Oil Co. v. Udall,* 409 F.2d 1115 (D.C. Cir. 1969), is misplaced. That case is readily distinguishable on the facts from this case. *Superior Oil* involved a competitive bidding situation where the Secretary had exercised his discretion to issue a lease, but tried to issue it to other than the first qualified applicant. The court held that where the Secretary decides to issue

a lease, the first qualified applicant has a right to receive the lease that is issued. The court did not hold that the Secretary was stripped of his established right to reject all lease applications. In the present case, the Secretary rejected all lease applications as, indeed, he was required to do by the terms of the Alaska Native Claims Settlement Act. Nothing in *Superior Oil* suggests that the Secretary did not have this power.

To the extent that *Superior Oil* is applicable at all, it undercuts rather than supports petitioners' position. Petitioners characterize this case as "a contract action under federal common law." (Pet. 4.) The court in *Superior Oil* made clear that, to the extent common law contract principles conflict with the requirements of the Mineral Leasing Act and the regulations issued thereunder, the statute and regulations must prevail:

> General rules of Government contract law must give way to the specific regulations and Notice of Sale governing this kind of transaction in the same way that common law contract principles must yield to the extent that they are inconsistent with governing regulations.

409 F.2d at 1121. The *Superior Oil* court also emphasized the need for "careful procedures" and "precision, care and certainty" in the administration of mineral leases. 409 F.2d at 1119.

The decisions of the lower courts in this case are entirely consistent with both of those principles espoused in *Superior Oil*. The lower courts correctly interpreted the departmental regulation requiring the signature of the appropriate government official as specifying the exclusive method for indicating lease offer acceptance, despite pe-

titioners' arguments to the contrary based on their own interpretation of principles of general contract law. In addition, the decisions of the lower courts were necessary to maintain the requisite degree of "precision, care and certainty" in the administration of mineral leases. The applicable regulations and general principles of contract law both require that the United States indicate in a written, signed document its intent to issue leases. This requirement promotes "precision, care and certainty" in lease issuance.

Furthermore, decisions of the District of Columbia Circuit since *Superior Oil* involving federal mineral leasing are entirely consistent with, and are frequently cited with approval in, decisions of the Ninth Circuit on the same subject. *See, e.g., Schraier v. Hickel,* 419 F.2d 663 (D.C. Cir. 1969); *McDade v. Morton,* 353 F. Supp. 1006 (D.D.C. 1973), *affirmed,* 494 F.2d 1156 (D.C. Cir. 1974); *Arnold v. Morton,* 529 F.2d 1101 (9th Cir. 1976); *Burglin v. Morton,* 527 F.2d 486 (9th Cir. 1975), *cert. denied,* 425 U.S. 973 (1976).

The asserted conflict between the Ninth Circuit and the District of Columbia Circuit is illusory.

B. *There Is No Other Reason That Warrants Review by This Court.*

Review of this case would serve no significant purpose. The issue here depends entirely on the application of the specific and unique facts of this case to undisputed, well-established principles of law. The applicable statute of limitations has long since expired on any other similarly situated claims. 30 U.S.C. § 226-2.

Moreover, since the Secretary has already conveyed legal title to the land involved, including subsurface rights, to respondent Arctic Slope Regional Corporation, petitioners' only viable remedy at this point is a claim for damages in the Court of Claims. Petitioners are at this time pursuing that remedy. Thus, review of this case by the Court would serve no significant purpose.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Kevin F. Kelly
WICKWIRE, LEWIS, GOLDMARK & SCHORR
Attorneys for Respondent Arctic Slope Regional Corporation

April 1981

No. 80-1480

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ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD ROWE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE SECRETARY OF THE INTERIOR IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Arnold v. *Morton*, 529 F. 2d 1101 7

Burglin v. *Morton*, 527 F. 2d 486, cert. denied, 425 U.S. 973 5

Duesing v. *Udall*, 350 F. 2d 748, cert. denied, 383 U.S. 912 5

Great Western Sugar Co. v. *Nelson*, 442 U.S. 92 7

Hodgson v. *First Fed. Sav. & L. Ass'n of Broward Co., Fla.*, 455 F. 2d 818 5

Schraier v. *Hickel*, 419 F. 2d 663 4

Superior Oil Co. v. *Udall*, 409 F. 2d 1115, remanded to dismiss as moot *sub nom. Superior Oil Co.* v. *Hickel*, 421 F. 2d 1089 ..... 6, 7

Udall v. *Tallman*, 380 U.S. 1 4

United States v. *Munsingwear*, 340 U.S. 36 7

Statutes and regulations:

Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.* :

43 U.S.C. 1613(e) 3
43 U.S.C. 1613(f) 3

Mineral Leasing Act of Feb. 25, 1920, 30 U.S.C. 181 *et seq.* 1

43 C.F.R. Part 3120 (1966) 1

43 C.F.R. 3123.5(b) (1966), recodified as 43 C.F.R. 3111.1-1(c) (1979) 2

Page

Miscellaneous:

31 Fed. Reg. (1966);

pp. 12575-12576 1

p. 15494 2

41 Fed. Reg. (1976):

p. 36672 3

p. 40193 3

Public Land Order 4582, 34 Fed. Reg. 1025 (1969) 2

Public Land Order 4962, 35 Fed. Reg. 18874 (1970) 2

Public Land Order 5081, 36 Fed. Reg. 12017 (1971) 2

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MEMORANDUM FOR THE UNITED STATES AND THE SECRETARY OF THE INTERIOR IN OPPOSITION

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1. On September 23, 1966, the Department of the Interior published in the Federal Register (31 Fed. Reg. 12575-12576; Pet. App. 99-105) a notice that certain lands in the State of Alaska were available for noncompetitive oil and gas leasing pursuant to the Mineral Leasing Act of Feb. 25, 1920 (30 U.S.C. 181 *et seq.*) and implementing regulations (43 C.F.R. Part 3120). Persons interested in leasing the lands were invited to submit offers to be accompanied by a check for the first year's advance rental. The successful offerors would be determined by a drawing. "Upon the determination of the successful drawee * * *, the first year's rental will be earned and deposited in the U.S. Treasury, and will not be returnable" (Pet. App. 103).

Groups of Alaskan natives protested this proposed disposition of resources in lands that they viewed as rightfully theirs. In response to these protests, on December 8, 1966,

the Department of the Interior published in the Federal Register a notice that the drawings would proceed as previously announced but that "issuance of oil and gas leases pursuant to offers filed * * * will be suspended pending further consideration of protests which have been received." 31 Fed. Reg. 15494.[1] Pursuant to Department regulation (43 C.F.R. 3123.5(b) (1966), recodified as 43 C.F.R. 3111.1-1(c) (1979)), the acceptance of a lease offer and issuance of the lease by the United States were to be indicated "by the signature of the appropriate officer thereof in the space provided [on the lease form]."

The drawing was held on December 20, 1966, and petitioners were among those whose offers were drawn. The first year's rentals accompanying their offers were deposited in the Treasury of the United States, but, in accordance with the December 8 notice published in the Federal Register, no leases were issued to them. In line with the requests of many of the applicants that their offers not be rejected until the protests had been resolved, the Department suspended further action and retained the first year's advance rentals (Pet. App. 64 n.64, 81, 87).

On January 17, 1969, the Secretary of the Interior issued Public Land Order 4582, which withdrew all public lands in Alaska from mineral leasing "for the determination and protection of the rights of the native Aleuts, Eskimos, and Indians of Alaska." 34 Fed. Reg. 1025.[2]

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[1]Public notices were also issued by the Land Offices in Anchorage and Fairbanks to the effect that any issuance of the leases would be postponed indefinitely following the drawing and that the first year's rental of the successful drawee would not be returnable (Pet. App. 20-21). Approximately 30% of the 1131 acceptable offers that had been submitted were withdrawn prior to the drawing, including those of several of the plaintiffs in this action (Pet. App. 21-22, 58 n.40).

[2]The duration of this withdrawal was subsequently extended by further withdrawals. See, *e.g.*, Public Land Order 4962, 35 Fed. Reg. 18874 (1970); Public Land Order 5081, 36 Fed. Reg. 12017 (1971).

In December 1971, Congress enacted the Alaska Native Claims Settlement Act, which, among other things, authorized the conveyance to Native Regional Corporations of the subsurface estate in lands selected by them. 43 U.S.C. 1613(f). Parts of the lands for which petitioners had been the successful drawees were selected by the Arctic Slope Regional Corporation, and on August 31 and September 17, 1976, an interim conveyance of these lands to the Corporation pursuant to 43 U.S.C. 1613(e) was approved by the Bureau of Land Management. 41 Fed. Reg. 36672; 41 Fed. Reg. 40193.

2. Contending that the drawing of their lease applications had vested in them certain rights in the lands covered by those applications, petitioners pursued an appeal within the Department of the Interior from the decision of the Bureau of Land Management to convey some of those lands to the Arctic Slope Regional Corporation. On November 24, 1976, the Acting Secretary of the Interior held that the drawing of petitioners' lease offers did not confer upon them any interest in the lands covered by the offers, and that the Secretary, having decided not to lease such lands at all, was under no duty to issue a lease to the petitioners (Pet. App. 85-89). The decision also directed that a refund be made of the advance rentals that accompanied the applications (*id.* at 97). To date, petitioners have refused to accept the tendered refunds.

On December 28, 1976, petitioners filed suit in the United States District Court for the District of Alaska, seeking the issuance to them of the oil and gas leases for which they applied and damages in excess of $10,000 for the failure to issue those leases. On cross-motions for summary judgment, the district court upheld the decision of the Secretary of the Interior and dismissed the entire case on the merits

(Pet. App. 12-76).[3] In particular, the court concluded "that the statutory mandate of the Mineral Act is not impeded, and indeed is buttressed by the retention of discretion to lease until the moment at which leasing occurs through execution" (464 F. Supp. at 1080).

On petitioners' appeal, the court of appeals affirmed in pertinent part (Pet. App. 1-11). Finding that the district court had jurisdiction over petitioners' claim for the issuance of mineral leases,[4] the court of appeals "agree[d] with the district court that [petitioners] failed to establish any right to the leases they sought, by contract, statute, or otherwise," and accordingly it "affirm[ed] the grant of summary judgment for [respondents] on this issue for the reasons stated in the district court's opinion" (*id.* at 9).

3. The courts below correctly upheld the Secretary's decision in this case on the basis of two well-settled principles under the Mineral Leasing Act. First, while the Act directs that the first qualified applicant is entitled to any noncompetitive oil and gas lease that is issued, it leaves "the Secretary [of the Interior] discretion to refuse to issue any lease at all on a given tract." *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965). See also, *e.g.*, *Schraier* v. *Hickel*, 419 F. 2d 663, 666 & n.7 (D.C. Cir. 1969). Second, "[t]he filing of an application which has not been accepted does not give any right to a lease, or generate a legal interest which

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[3]The district court's decision, as reprinted in the petitioners' appendix, lacks the last three paragraphs. The decision is reported in full at 464 F. Supp. 1060 (1979).

[4]The court of appeals also concluded that petitioners' claim for damages in excess of $10,000 was within the exclusive jurisdiction of the Court of Claims, and therefore that the district court should have either dismissed this claim for lack of jurisdiction or transferred it to the Court of Claims (Pet. App. 8). On February 27, 1981, petitioners filed in the district court a "Motion to Transfer Claims for Damages to the Court of Claims."

reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved." *Duesing* v. *Udall*, 350 F. 2d 748, 750-751 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966). See also, *e.g.*, *Burglin* v. *Morton*, 527 F. 2d 486, 488 (9th Cir. 1975), cert. denied, 425 U.S. 973 (1976). In light of these established principles, it is evident that the Secretary has discretion to decide not to lease the lands at issue here and that the filing of oil and gas lease offers for the lands in no way limits the Secretary in the exercise of his discretion or gives petitioners any rights in those lands.

Petitioners attempt to avoid these principles by contending that under the "rules of contract law that are applied to transactions between private parties," the Secretary's deposit in the Treasury of their first year rentals, and the subsequent failure to return the money to them, constituted an acceptance of their lease offer (Pet. 13, 15). However, "[t]he essence of an agreement is mutual assent and in a court of law the existence of assent can only be reconstructed through evidence of words or deeds which objectively manifest the expression of assent." *Hodgson* v. *First Fed. Sav. & L. Ass'n of Broward Co., Fla.*, 455 F. 2d 818, 824 (5th Cir. 1972). Here, it is clear that petitioners' offers were never accepted.

First, as the district court found, the administrative scheme "clearly contemplated that during the period following the drawing * * * the [Department] could reject a lease offer and be required to refund the advance rental * * *" (Pet. App. 46). This understanding was reinforced by the public notices that issuance of the leases following the drawing would be suspended pending further consideration of protests filed with the Department (see page 2, *supra*). And "[n]owhere in the notice [inviting lease offers] is there mention that the non-returnability provision altered the Secretary's traditional discretion over whether or not to

lease" (Pet. App. 44). Consequently, even before the drawing, petitioners knew not only that their first year's rentals would be deposited in the Treasury if their offers were drawn, but also that the deposit of their money would have no bearing on whether leases would ever issue as a result of the drawing.

Second, the Department's "regulations, in force at the time, explicitly stated that acceptance of a lease offer would be indicated by the exclusive method of the Secretary's signature on the lease form" (Pet. App. 47). Thus, "acceptance of a simultaneous lease offer could not have been indicated in any manner other than by a signature of the appropriate officer on the lease form" (*ibid.*). Since the Department did not endorse the lease form, petitioners' offers were never accepted.

Accordingly, the district court correctly concluded that "[t]here is no support anywhere for [petitioners'] theory that * * * the [leasing] notice was somehow * * * intended to alter the established policy and requirements of law * * * that lease acceptance remain within the full discretion of the Secretary up until a designated government official had executed leases in favor of priority-holding applicants" (Pet. App. 45). Nor is a different result suggested by *Superior Oil Co.* v. *Udall*, 409 F. 2d 1115 (D.C. Cir. 1969), upon which petitioners heavily rely, for that case involved only the question of which of two competing offerors was entitled to an oil and gas lease that the Secretary had decided to issue. Nothing in *Superior Oil* bears on the

Secretary's discretion, as in this case, to refrain from issuance of a lease at all. Cf. *Arnold* v. *Morton*, 529 F. 2d 1101, 1106 n.10 (9th Cir. 1976).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

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[5]We also note that the precedential effect of *Superior Oil* may be in question in light of the fact that the case was ultimately remanded to the district court with instructions to dismiss it as moot. *Superior Oil Co.* v. *Hickel*, 421 F. 2d 1089 (D.C. Cir. 1969). See, *e.g.*, *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).